TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~370.~~ 166

ALLEN T. CAPERTON, PLAINTIFF IN ERROR,

vs.

WILLIAM A. BALLARD, ADMINISTRATOR OF WILLIAM BALLARD, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED DECEMBER 9, 1870.

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INDEX.

	Original.	Print.
Petition	1	1
Writ of error	3	1
Citation and service	5	2
Bond	6	2
Petition	9	3
Summons	12	4
Declaration	14	5
Amended declaration	15	6
Demmurrer and pleas	16	7
Opinion of court refusing change of venue	23	11
Bill of exceptions	25	12
Pardon	30	15
Bill of exceptions	33	16
Defendant's petition	39	19
Defendant's affidavit	40	21
Plaintiff's affidavit	42	21
Proclamation	43	22
Proceedings in supreme court	45	23
Judgment	45	23
Certificate of clerk	46	23
Certificate of judge	46	23
Judgment	48	24
Certificate of clerk	49	24
Opinion of court	50	25

To a justice of the Supreme Court of the United States:

The petition of A. T. Caperton respectfully represents, that in a suit brought in the circuit court of Monroe County, in the State of West Virginia, by William A. Ballard, administrator of William Ballard, deceased, there has been final judgment in the highest court of law of the State in which a decision in the suit could be had, and said suit is drawn in question the validity of a statute or an authority exercised under the United States, to wit, the thirteenth section of the act of Congress, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved 17 July, 1862, and the decision is against its validity; and in said suit there is also drawn in question the construction of the first clause of the 10th section of the first article, and of the second section of the second article of the Constitution of the United States, or of a statute of, or commission held, under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by your petitioner under such clauses of said Constitution, or under such statute or commission: Wherefore, your petitioner prays a writ of error by which such judgment may be reëxamined and reversed in the Supreme Court of the United States.

A. T. CAPERTON.

(Indorsed:) A. T. Caperton vs. Ballard's adm'r. Petition.

UNITED STATES OF AMERICA, *ss*:

[SEAL.] The President of the United States to the honorable the judges of the supreme court of appeals of the State of West Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals of the State of West Virginia, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Allen T. Caperton, plaintiff in error, and William A. Ballard, administrator of William Ballard, deceased, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Allen T. Caperton, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held,

that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-nine.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Issued March 16, 1870.
Allowed by—

S. P. CHASE,
Chief Justice.

(Indorsed:) A. T. Caperton vs. W'm Ballard's adm'r. Writ of error.

I certify that a copy of this writ for the defendant, William Ballard's adm'r, was lodged in the clerk's office of the supreme court of appeals of West Virginia, on the 21 day of March, 1870.

SYLVANUS W. HALL,
Clerk.

5 The United States of America to William A. Ballard, administrator of William Ballard, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 1st Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of appeals for West Virginia, wherein A. T. Caperton is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 16th day of March, in the year of our Lord one thousand eight hundred and seventy.

S. P. CHASE,
Chief Justice.

6 (Indorsed:) A. T. Caperton vs. W'm Ballard's adm'r. Citation.

I certify that a copy of this citation was filed in the clerk's office of the supreme court of appeals of W. Va., the 21 day of March, 1870.

SYLVANUS W. HALL,
Clerk.

Service of the within citation acknowledged this 2d day of November, 1870.

B. STANTON,
Att'y for Def'd't.

7 Know all men by these presents that we, A. T. Caperton and Hugh Caperton, are held and firmly bound unto William A. Ballard, administrator of Willam Ballard, deceased, in the full and just sum of twenty-five hundred dollars, to be paid to the said William A. Ballard,

administrator as aforesaid, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this sixteenth day of March, 1870, *in the year of our Lord one thousand eight hundred and* .

Whereas lately at a supreme court of appeals for West Virginia, in a suit depending in said court, between the said A. T. Caperton, plaintiff in error, and the said William A. Ballard, administrator as aforesaid, defendants in error, judgment was rendered against the said A. T. Caperton, and the said A. T. Caperton having obtained a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said William A. Ballard, administrator of William Ballard, deceased, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said A. T. Caperton shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) A. T. CAPERTON. [L. S.]
(Signed) HUGH CAPERTON. [L. S.]

Sealed and delivered in presence of—

Approved by—
(Signed) S. P. CHASE,
Chief Justice.

8 Hugh Caperton maketh oath, and saith that he is a resident of the city of Georgetown, and believes himself to be worth double the amount of the annexed bond, after discharging all his other liabilities.

Sworn to before the subscriber, a justice of the peace for the District of Columbia.

(Signed) ROBERT WHITE, [SEAL.]
J. Peace.

(Indorsed:) A. T. Caperton vs. W'm Ballard's adm'r. Copy of bond.

9 Supreme court of appeals of West Virginia, Wheeling.

A. T. CAPERTON.
vs.
WILLIAM BALLARD'S ADMINISTRATOR.

Petition.

To the honorable the judges of the supreme court of appeals of West Virginia:

The petition of A. T. Caperton respectfully represents—

That he is aggrieved by a judgment rendered in the circuit court of Monroe, on the 22d July, 1867, in a suit against him by the administrator of W'm Ballard, deceased.

Your petitioner herewith presents a transcript of the record in said case, and assigns the following as some of the errors therein committed:

1st. In sustaining the plaintiff's demurrer to defendant's plea, No. 4.

10 2d. In sustaining plaintiff's demurrer to defendant's 5th special plea.

3d. No issue was made up on what is termed the defendant's additional plea No. 6. The plaintiff filed a replication to this plea, concluding to the country, but there was no similiter.

4th. In not granting the change of venue applied for by the plaintiff. (See record, pages 17 and 18, for judgment on this motion and opinion of the court, and pages 47-'8-'9 for petition and affidavits.)

5th. In excluding evidence of the contents of a letter by the defendant to Wilson Lively. (See bill of exception No. 1, page 21.)

6th. In stating in the presence of the jury, as a matter within the knowledge of the court, the fact that Lively was subordinate to the authority of the defendant—a fact which was being tried by the jury. The instruction to the jury to disregard this statement by the court did not remove or relieve the objection. (See exception No. 2.)

7th. In excluding from the jury the defendant's pardon by the President of the United States.

8th. In refusing the instructions Nos. 1, 2, and 3. (See exception No. 4.)

For these and other reasons apparent on the record, your petitioner prays that the said judgment may be superseded and reversed.

A. T. CAPERTON.

I, Henry C. McWhorter, a practising attorney in the court of appeals of West Va., do hereby certify that I have examined the foregoing record, and am of opinion there is error in the same sufficient to review and reverse it.

H. C. McWHORTER.

October 3d, 1864.

11 Supersedeas allowed as prayed for, upon the petitioner giving bond and security, as required by law, in the penalty of $2,516, conditioned according to law.

J. H. BROWN.

October 4, 1867.

To the CLERK of the supreme court of appeals.

12 RECORD.

STATE OF WEST VIRGINIA.

Pleas at the court-house of Monroe County, before the judge of the circuit court of said county, on the 22d day of July, one thousand eight hundred and sixty-seven.

Be it remembered that, heretofore, to wit, on the 11th day of May, 1866, came William A. Ballard, administrator, &c., of William Ballard, deceased, by his attorney, and sued out of the clerk's office of the said court a certain summons against Allen T. Caperton, which summons, with the endorsement and return thereon made, is in the words and figures following:

The State of West Virginia to the sheriff of Monroe County, greeting:

We command you that you summon Allen T. Caperton, if he be found

in your bailiwick, to appear before the judge of our circuit court for Monroe County, at rules to be held in the clerk's office of said county, on the first Monday in June next, to answer William A. Ballard, administrator, &c., of William Ballard, deceased, of a plea of trespass on the case, illegal seizure, sale or destruction of the property of his intestate, William Ballard; damage, $10,000. And have then there this writ.

Witness James E. Howell, clerk of our said court, at the court-house of said county, on the 17th day of May, 1866, and in the 3d year of the State.

J. E. HOWELL.

13 *Return.*

WEST VIRGINIA,
Clerk's Office, Monroe County, to wit:

This day Daniel J. Early made oath in this office that he this day delivered an office copy of the within summons to the defendant, Allen T. Caperton.

J. E. HOWELL,
Clerk Cir. Court M. County.

And at another day, to wit, at rules held in the clerk's office of the said court on the first Monday in June, 1866: This day came the defendant, by his attorney, and a day is thereupon given the plaintiff until the next rules to file his declaration. And the same day is given the said defendant there, &c.

At which day, to wit, at rules held in the clerk's office of the said court on the first Monday in July, 1866, the plaintiff having been ruled to file his declaration, and failing so to do, on the motion of the defendant, by his attorney, it is ordered that the said plaintiff be non-suited, and pay to the defendant five dollars, according to law, besides the costs by the defendant about his defence expended.

And at another day, to wit, at a circuit court continued and held for the county of Monroe, at the court-house thereof, on Friday the 3d day of August, 1866, on motion of the plaintiff, by his counsel, who filed his declaration, it is ordered that the non-suit entered at the rules in this cause for want of a declaration be set aside, and that this cause be reinstated on the rule docket; to which order setting aside the non-suit and reinstating this cause on the rule docket, the defendant, by his counsel, excepts, because the order setting aside the non-suit does not state that the penalty of five dollars and costs incurred thereby are not intended to be set aside also; which exceptions are ordered to be made a part of the record.

14 *Declaration.*

Circuit court of Monroe County.

STATE OF WEST VIRGINIA,
Monroe County, to wit:

William A. Ballard, administrator, &c., of William Ballard, complains of Allen T. Caperton who has been summoned, &c., of a plea of trespass on the case, for that the said defendant, on the 28th day of January, 1863, in the county aforesaid, in the then State of Virginia,

and present State of West Virginia, seized, took, and carried away, and procured, caused, ordered, directed and instigated others to seize, take, and carry away certain goods and chattels, to wit, farming and agricultural tools and utensils, household goods and utensils, and other property of the said William Ballard, the plaintiff intestate, of great value, to wit, of the value of $5,000 there then found and being, and other wrongs then and there did, and procured, caused, ordered, directed, and instigated others to do, against the peace, and to the plaintiff's damage $10,000; and therefore he brings suit.

C. NEWLIN, *P. Q.*

And at another day, to wit, at rules held in the clerk's office of said court, on the first Monday in September, 1866, on the motion of the plaintiff; (who had filed his declaration at July term,) it was ordered that judgment be entered for said plaintiff against the defendant for what damages he ought to recover, unless the defendant shall appear at the next rules and answer the plaintiff's action.

And at another day, to wit, at rules held in the clerk's office of said court, on the first Monday in October, 1866, came the plaintiff, by his attorney, and filed his amended declaration against the defendant, which declaration is in the words and figures following, to wit:

15 Circuit court of Monroe County.

STATE OF WEST VIRGINIA,
Monroe County, to wit:

William A. Ballard, administrator, &c., of William Ballard, deceased, complains of Allen T. Caperton, who has been summoned, &c., of a plea of trespass on the case, for that the said defendant, on the 20th day of December, 1862, at the county of Monroe, aforesaid, in the then State of Virginia, and present State of West Virginia, unlawfully, wrongfully, and without any reasonable or probable cause whatsoever, with force and arms, seized, took, drove, and carried away, and procured, caused, directed, ordered, and instigated others to seize, take, drive, and carry away certain goods and chattels, to wit: Four horses, four mares, four geldings, twelve bulls, twelve oxen, twelve steers, sixteen boars, sixteen barrows, sixteen sows, sixteen ewes, seventeen rams, seventeen wethers, two wagons, one hundred bushels of corn, one rifle-gun, one set of harness, and a large quantity of tools and farming utensils of the said William Ballard, of great value, to wit, of the value of $5,000, there then found and being, and converted and disposed thereof to his own use, and caused, procured, ordered, directed, and instigated others to convert and dispose thereof to their own use, and other wrongs to the said William Ballard, and to the plaintiff, as administrator aforesaid, then and there did, against the peace and to the plaintiff's damage, as administrator aforesaid, of $10,000; and therefore he brings suit.

And the plaintiff avers that since that time, to wit, on the day of , 1866, he was duly qualified as administrator of the said William Ballard, in the circuit court of Monroe County, which is of record, and which gives sufficient evidence to the court here of the grant of administration to the said William A. Ballard as aforesaid, the date whereof is the day and year in that behalf above mentioned.

C. NEWLIN, *P. Q.*

16 And on motion of said plaintiff, by his attorney, the common order entered at last rules is set aside, and on his further motion, it is ordered, that judgment be entered for the plaintiff against the defendant, for what damages he ought to recover, unless the defendant shall appear at the next rules and answer the plaintiff's action.

At which day, to-wit, at rules held in the clerk's office of the said court on the first Monday in November, 1866, came the defendant, by his attorney, and thereupon the said defendant filed his demurrer to the plaintiff's declaration, and five special pleas in writing, and a day is thereupon given the plaintiff until the next rules to reply, and the same day is given the said defendant there, &c..

Defendant's demurrer and pleas.

WEST VIRGINIA, *Circuit court of Monroe County:*

WILLIAM BALLARD, ADM'R ESTATE OF WILLIAM BALLARD, plaintiff,
against
A. T. CAPERTON.
} Demurrer and pleas.

The defendant says that the declaration is not sufficient in law.

No. 3. The defendant says that he is not guilty of the supposed greivances laid to his charge, or any or either of them, or any part thereof in manner and form as the plaintiff hath thereof complained against him, and of this he, the said defendant, puts himself upon the country.

No. 4. The defendant says that before the time of the supposed greivances complained of in the declaration, he had on oath, made in conformity with laws long existing in the Commonwealth of Virginia, declared himself a citizen of the said Commonwealth, and solemnly sworn that he would be faithful and true to the said Commonwealth as long
17 as he continued to be a citizen of the same, and until, and at, and before the time of said supposed greivances, he did in fact continue to be a citizen of the same, and before and at the time of the said supposed greivances the said Commonwealth was engaged in actual war, and an army consisting of a large number, to wit, thousand soldiers, was raised within the territory of said Commonwealth, for the safeguard and defence of the same against those who then, by those acting in the city of Richmond, in said Commonwealth, as the authorities of said Commonwealth, were deemed the enemies thereof, and during the time that said army was in actual service, neither said territory, for safeguard and defense, and while the then actual authorities of said Commonwealth, and those in the same confederacy therewith, were not only belligerents but recognized as such by the Government of the United States, Gen. H. Heth, the general and commander of the troops forming part of said army in actual service, did, under the authority of the executive power then in fact exercised over said Commonwealth, and over those in the same confederacy therewith, appoint the defendant provost-marshal of the county of Monroe, and while the defendant was provost-marshal under said appointment, the plaintiff's intestate, without any special order or instigation by the said defendant was arrested for harboring deserters, by a portion of those then in actual service, and whose duty it was to arrest all persons who might be found engaged in harboring deserters; and being so arrested, he, the said

plaintiff's intestate, broke from the guard and escaped, and went within the lines of the then enemy, where he remained for a long space of time, to wit, for the space of —— months; and after he had so escaped, and while within the lines of the then enemy, in pursuance of a regulation and practice which then prevailed under the authorities then actually existing, the property of the plaintiff's intestate, without any special order or instigation of the defendant, was seized and disposed of, as was done whenever a party had abandoned home and property and
18 had gone to the enemy, and all the supposed greivances complained of in the said plaintiff's declaration were, so far as the defendant did or procured, caused, directed, ordered, or instigated others to do the same, done while the defendant was such provost-marshal under said appointment, and done in what was then in fact the territory of said Commonwealth, and done in pursuance of the executive authority which then in fact governed in said Commonwealth, and in accordance with such laws, rules, and regulations as then in fact prevailed therein. Wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid thereof action against him, &c.

Defendant's plea.—No. 1.

The said defendant for plea says, that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said plaintiff is not nor ever hath been administrator of the goods or chattels, rights or credits which were of the said William Ballard, deceased, in manner and form as the plaintiff hath above in that behalf alleged, and this the said defendant is ready to verify. Wherefore, he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

Defendant's plea.—No. 2.

And for further plea, the defendant craves over of the supposed letters of administration granted to the plaintiff, and they are read to him in these words:

At a circuit court continued and held for the county of Monroe, at the court-house thereof, on Wednesday, the 25th day of April, 1866, administration on the personal estate of William Ballard is granted to William A. Ballard, who appeared in court and was sworn, and, together with John C. Ballard and Patrick H. Hawkins as his securi-
19 ties, entered into and acknowledged a bond in the penalty of $3,000, conditioned according to law; certificate for obtaining letters of administration on the personal estate of said William Ballard, in due form is granted him; which being read and heard, the defendant says that long before the said supposed letters of administration were granted to the plaintiff, to wit, at the regular term of the court for Monroe County, for February, 1863, the said court duly granted letters of administration of the estate of the said William Ballard, deceased, to John C. Ballard, who made oath as administrator, and, together with George Loudermilk and James W. Johnson, his securities, entered into and acknowledged his bond in the penalty of two thousand dollars, conditioned according to law, and letters of administration were in due form granted him, and this the said defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him.

Defendant's plea.—No. 5.

And the defendant, for further plea, says that Andrew Johnson, President of the United States of America, at the city of Washington, on the 7th day of September, 1865, and of the independence of the United States the ninetieth, by an instrument of writing whereunto he signed his name and caused the seal of the United States to be affixed, after reciting that the defendant by taking part in the late rebellion against the Government of the United States had made himself liable to heavy pains and penalties, and the circumstances of his case render him a proper object of executive clemency, did grant to this defendant a full pardon and amnesty for all offences by him committed arising from participation, direct or implied, in the said rebellion; and the defendant took the oath prescribed in the proclamation of the President, dated May 29th, 1865, and the defendant duly notified the Secretary of State in writing that he had received and accepted the
20 said pardon; and the defendant further says that all the grievances complained of in the declaration are acts arising from participation, direct and implied, in the said rebellion, and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

And at another day, to wit, at rules held in the clerk's office of the said court, on the first Monday in December, 1866, came the plaintiff, by his attorney, and filed his joinder and replications to defendant's demurrer and pleas, which joinder and replications are in the words and figures following, to wit:

The plaintiff, as to the demurrer of the defendant, says that the declaration is sufficient in law.

Plaintiff's replications.

1st. The plaintiff, for replication to the 1st special plea of the defendant, says that he ought not to be barred from having and maintain'g his aforesaid action, because he says that he is administrator of the goods and chattels, rights and credits, which were of the said William Ballard, deceased; and of this he puts himself upon the country.

2d. The plaintiff, for replication to the second special plea of the defendant, says that he ought not to be barred from having and maintaining his aforesaid action, because he says that the said letters of administration in the said plea mentioned, to wit, the letters granted in February, 1863, were letters granted by a court in rebellion against the Government and rightful authority of the United States, and were null and void; and of this he puts himself upon the country.

3d. The plaintiff, as to the defendant's plea of not guilty and whereof he hath put himself upon the country, doth the like.

4th. The plaintiff demurs to the fourth plea of the defendant, because the same is not sufficient in law.

21 5th. The plaintiff demurs to the fifth special plea of the defendant, because the same is not sufficient in law.

And at another day, to wit, at a circuit court continued and held for the county of Monroe, at the court-house thereof, on Saturday, the 27th day of April, 1867, this cause was continued until the next term.

And at another day, to wit, at circuit court continued and held for the county of Monroe, at the court-house thereof, on Wednesday the 26th day of June, 1867; this day came the defendant, in person, and, in addition to the pleas heretofore filed by him, filed a special plea in writing, which plea is in the words and figures following, to wit:

Defendant's plea, No. 6.

The defendant says that, after the committing of the supposed grievances in the declaration mentioned, and before the commencement of this suit, to wit, on the 20th day of July, 1863, the net proceeds arising from the sale of the goods and chattels in the declaration mentioned, to wit, the sum of seven hundred and ninety-four dollars and nineteen cents was paid to the then administrator of the goods and chattels of the said William Ballard, deceased, for and in full satisfaction and discharge of the grievances in the declaration mentioned, and the nett proceeds he, the said then administrator, then and there accepted and received in full satisfaction and discharge of the said grievances, and this the said defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him.

Plaintiff's replication to defendant's additional plea—No. 6.

The plaintiff, for replication to the defendant's additional plea, says that he ought not to be barred from having and maintaining his
22 aforesaid action by reason of anything by the defendant in his said plea alleged, because he says that neither on the 20th day of July, 1863, nor at any other time, was the sum of seven hundred and ninety-four dollars and nineteen cents the alleged proceeds in the said plea mentioned, or any part thereof, paid to the lawful administrator of William Ballard, deceased, or to any other person having authority to receive the same; and of this he puts himself upon the country.

And at another day, to wit, at a circuit court continued and held for the county of Monroe, at the court-house thereof, on Thursday, July 18th, 1867: This day came the parties, by their attorneys, and the defendant's demurrer to the plaintiff's declaration, in which the plaintiff joined, being argued, it is considered by the court that the same be overruled, and that the said declaration is sufficient in law.

And the plaintiff's demurrer to the fourth and fifth special pleas of the defendant, (in which the defendant joined,) being argued, it is considered by the court that the said demurrer be sustained, and that the said pleas are not sufficient in law.

Thereupon, the defendant, A. T. Caperton, moved the court to change the venue in this case, for reasons assigned in his petition, which was accompanied by affidavits, and the motion being resisted by the plaintiff's counsel, and counter affidavits in opposition thereto filed, all which are made a part of this order, the court, upon consideration of the said petition and affidavits, and for reasons assigned in the written opinion of the court, which is filed as a part of the record, doth overrule the said motion, and refuse to change the venue in this cause; to which refusal, the defendant, by his counsel, excepted, which exception is ordered to be made a part of the record.

And thereupon came a jury, to wit, Willis Barton, Joseph Grimmett, Jno. H. Comer, John Reynolds, Jacob Neel, Jos. K. Smithson, Jacob

Grimmett, James Barton, Samuel Dehart, J. P. Rollyson, H. M.
23 Hogshead, and W'm Jones, who, being elected, tried, and sworn the truth to speak upon the issues joined, and having partly heard the evidence, were adjourned until to-morrow morning, 10 o'clock.

Opinion of the court refusing to change the venue.

Applications for a change of venue are addressed to the sound discretion of the court. The court, upon consideration of the affidavits and counter affidavits filed, cannot come to the conclusion that impartial justice cannot be done to the defendant by a jury of this county, especially as the court in every instance where applied to by the said defendant has directed a special jury to be empannelled in all his cases (heretofore tried at this term) under the 25th section, Code of 1860, p. 691, and in all such cases subjected such person to the sifting test propounded by section 21st Id. The court has no reason from the character of the verdicts already rendered against the defendant in other cases at this term, or otherwise to believe that he cannot obtain a fair and impartial trial of this cause in this county, and that the qualified jurors of this county when interrogated as aforesaid by the court, would swear falsely. Besides, the plaintiffs in these trespass suits in this court, are generally (as in this case) men of limited means and would be subjected to great inconvenience and expense by a removal of their causes to another county. Besides, too, in consequence of the time fixed by law for holding the courts in the different counties of this circuit, this court which is now sitting and can continue to sit according to law, if necessary, until the 1st of next September, is the only court in this circuit in which there could be time enough for the trial of the many and protracted trespass cases on this docket. Besides, too, neither in Mercer or McDowell is there a court-house now established of sufficient accommodation even for the business of those counties, and in Greenbrier and
Pocahontas (the only other two counties in this circuit) the
24 time now allotted by law for holding courts, there is not half enough for the business which has already accumulated in those counties, and a change of venue to either of those counties would operate, in the opinion of the court, as an indefinite postponement of the trial of this cause. Motion for change of venue is, therefore, overruled.

N. HARRISON.

And at another day, to wit, at a circuit court continued and held for the county of Monroe, at the court-house thereof, on Friday, the 19th day of July, 1867, this day came again, the parties, by their attorneys, and the jury sworn to try the issues in this cause, appeared in court, according to their adjournment, and not having heard all of the evidence, were adjourned until to-morrow morning, 10 o'clock.

And at another day, to wit, at a circuit court continued and held for the county of Monroe, at the court-house thereof, on Saturday, the 20th day of July, 1867: This day came again the parties, by their attorneys, and the jury sworn to try the issues in this cause appeared in court, according to their adjournment, and having heard all of the evidence and arguments of counsel, were sent out of court to consult of their verdict, and after some time returned, and not having agreed in a verdict, were placed in charge of the sheriff of this county until Monday morning next, 8 o'clock.

And at another day, to wit, at a circuit court continued and held for the county of Monroe, at the court-house thereof, on Monday, the 22d day of July, 1867: This day came the parties, by their attorneys, and the jury sworn to try the issues in this cause appeared in court, according to their adjournment, and being again sent out of court to consult of their verdict, after some time returned, and upon their oath do say:

"We, the jury, find for the plaintiff on all the issues joined in
25 this case, and on the issue joined upon the plea of not guilty. We further assess the plaintiff's damages against the defendant at twelve hundred and fifty-eight dollars."

Therefore it is considered by the court that the plaintiff recover against the defendant twelve hundred and fifty-eight dollars, his damages assessed as aforesaid, and his costs by him about his suit in this behalf expended.

Upon the trial of this cause the defendant tendered sundry bills of exceptions, which were signed, sealed, and ordered to be made a part of the record in this cause.

Bill of exceptions, No. 1.

Be it remembered that, upon the trial of this cause, after the plaintiff had introduced testimony tending to prove that the goods and chattels in the declaration mentioned were seized and sold by one Wilson Lively, acting as assistant confederate provost-marshal for Monroe County, and also evidence tending to prove that the said goods and chattels were so seized and sold by order of the defendant, then acting as confederate provost-marshal of said county, also after the plaintiff had introduced a witness, to wit, John C. Ballard, son of the plaintiff's intestate, who swore that, prior to the sale, he applied to the defendant, as provost-marshal of Monroe County, to postpone the said sale, which he promised to do, but did not, and that after the said sale, when he met the said defendant, he admitted that he had promised to postpone the sale, but that, after making said promise, he had met with Wilson Lively, assistant provost-marshal as aforesaid, who informed him that he was about to leave the county of Monroe, and could not conduct the sale if it were postponed, and that, for this reason, he, the defendant, had directed him to proceed with the sale. Thereupon the defendant, for the purpose of showing that he had directed a postponement of the said sale, offered to prove the contents of a letter addressed by him, in his character as provost-marshal, to said Wilson Lively in his life-
26 time, in which letter he claimed to be able to show that he had directed the said Lively to postpone the sale. In support of his motion to let in evidence of the contents of said letter, the plaintiff offered his own affidavit, that he had used due diligence to obtain the said letter, and also a witness named William Hinton, administrator of Wilson Lively, deceased, who swore that after he qualified as administrator of said Lively, he found the said letter among the papers of his intestate, and had read the same, but that the said letter had been since lost or mislaid in some way, and that after diligent search therefor, he could not find it. Said Hinton further proved that he did not recollect either the day or the year when the said letter was written, or whether it was signed by the defendant in his individual or official character, but he recollected that it referred to the sale in the declaration mentioned.

William Adair, another witness introduced by the defendant in support of said motion, swore that the said letter bore date in 1862, and was signed by defendant as provost-marshal of Monroe County, but that he did not remember either the month or day of its date, but inferred that it was dated before the sale in the declaration mentioned, as the letter referred to a sale which had not taken place. The court was of opinion that due diligence had been shown in the attempt to discover and produce the said letter; but the court being further of opinion that oral evidence of the contents of such a letter ought to be received with caution; that, if received at all in this case, it could only be received upon the ground that it was part of the res gestæ of the sale, and that, in the absence of any definite proof of the date of said letter, it was impossible for the court to determine whether it was part of the res gestæ or not; and further, that, to permit evidence as to the contents of such a letter, would not only be to allow the defendant to give evidence for himself, but to contradict his own statements as sworn to by the
27 witnesses John C. Ballard, by a letter of the defendant himself. For these reasons the court overruled the said motion, and excluded evidence of the contents of said letter. To which opinion of the court the defendant, by his counsel, excepted, and it is ordered that these exceptions be signed, sealed, and made a part of the record.

N. HARRISON. [SEAL.]

Bill of exceptions.—No. 2.

On the trial of this cause, in delivering its opinion overruling the defendant's application to let in evidence of the contents of a letter referred to in bill of exceptions No. 1, (which bill is here referred to as a part of this bill,) the court used the following language:

That oral evidence of a letter or other writing which is material to the issue between the parties or to the credit of witnesses, if admissible at all, is never allowed but in a clear case, and with great precaution. (See 1 Greenleaf's Evidence, sec. 88.) In considering this application, the court must look to the presumption—

1st. That a public sale of confiscated property in 1862, made upon public notice, and conducted by Wilson Lively, as assistant provost-marshal of Monroe County, was made with the knowledge and consent of the principal provost-marshal himself.

2d. That Lively, as assistant provost-marshal, would not refuse to obey a positive order of his principal in regard to the sale in the declaration mentioned.

3d. That, if he had so refused, *that* the defendant, as provost-marshal of the county, would have taken proper measures to enforce his order, and prevent the sale. In the absence of any proof to rebut those presumptions, and after the death of Wilson Lively, it would be neither just to him, nor fair to the plaintiff in this action, to permit these
28 presumptions to be counteracted by proof of the contents of a letter in regard to the date of which there was no positive or precise evidence. If the letter was written after the sale complained of, it could not be evidence in any view; if written before, (whether in the individual or official character of the defendant,) it could only be evidence, if at all, as part of the res gestæ of the sale; and in the absence of any proof as to the date, it is impossible for the court to determine whether it was part or not of the res gestæ. A positive order from the defendant, written ten days before the sale, forbidding the same, might have been afterwards countermanded, either verbally or in writing, by the defendant.

Besides, J. C. Ballard, a witness for the plaintiff, swore that before the sale, when he applied to the defendant as provost-marshal of Monroe, to postpone the sale of the property that he promised to do so, and that when, after the sale, he met with the defendant, the defendant admitted that he had made this promise, but that when he afterwards met with Wilson Lively, he, (Lively,) stated that he was about to leave the county of Monroe, and if the sale was postponed, that he could not conduct it, and that he, (the defendant,) on this account, had directed Lively to go on with the sale.

It seems to the court that to permit the defendant to offer evidence of the contents of a letter written by himself to Wilson Lively, for the purpose of showing that the defendant did not order the sale, (as sworn by the witness J. C. Ballard,) would be to allow the defendant to become a witness for himself, and to contradict his own admission (as sworn to by this witness,) by his own letter.

In the course of its opinion (overruling the motion to let in proof of the contents of this letter,) the court, amongst other things, stated that in 1862 and 1863, the judge of this court was a resident of the county of Monroe, and lived only three miles from the provost-marshal's office
29 of this county, and to some extent was both historically and practically familiar with the duties and proceedings of that office, and that in deciding this application, the court could not close its eyes to what it thus knew, that the office of provost-marshal of this county was thoroughly organized, and conducted with the strictest discipline, and that the assistant provost-marshals, as well as provost or police guard of that office, were all subordinate to the authority of the provost-marshal.

To this latter part of the court's opinion, the defendant, by his counsel, objected, stating that whether Wilson Lively, ass't p.-marshal, acted in this case by the authority and order of the defendant, or whether his office, as assistant, was subordinate or not to that of the defendant, as provost-marshal, were issues in this cause for the jury to determine, and that the court had no right to make the above statements in regard thereto in the presence of the jury.

The court distinctly stated to the jury that no statements made by the court on this motion could have, or were intended by the court to have any effect upon the jury as to any question of fact in this case, and that the jury would understand the court as instructing them to disregard all such statements, and, at the same time, distinctly stated to the counsel that the court simply adverted to the matter above referred to in further explanation of the grounds of its opinion overruling the motion.

To the above statements of the court in the presence of the jury, the defendant, by his counsel, excepted, and his exceptions are signed, sealed, and made a part of the record.

N. HARRISON. [SEAL.]

Bill of exceptions.—No. 3.

On the trial of this cause, evidence, amongst other things, having been introduced, tending to show that the property in the declaration mentioned had been seized and sold by order of the defendant, in August or September, 1862, and whilst the defendant was acting as
30 confederate provost-marshal of Monroe County, under authority derived from Gen. Heth, then in command of the confederate forces in this department, and on the recommendation of the county

court of Monroe, (a court then in rebellion against the United States,) made at the instance of the said Heth; that confederate martial law, by a proclamation of Jefferson Davis, late president of the southern confederacy, was then prevailing in the said county, and that said county, at that time, was in the actual occupation of a portion of the confederate forces, (the said defendant being over the age of conscription when he was thus appointed and acted as provost-marshal aforesaid, and not belonging to the military service of the confederacy.) Thereupon the said defendant offered in evidence in mitigation of damages and justification, a pardon to him from the President of the United States, dated the day of , 1866, which is in the words and figures following:

Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting:

Whereas A. T. Caperton, of West Virginia, by taking part in the late rebellion against the Government of the United States, has made himself liable to heavy pains and penalties; and whereas the circumstances of his case render him a proper object of executive clemency:

Now, therefore, be it known, that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant to the said A. T. Caperton a full pardon and amnesty for all offenses by him committed, arising from participation, direct or implied, in the said rebellion, conditioned as follows:

1st. This pardon to be of no effect until the said A. T. Caperton shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865.

31 2d. To be void and of no effect if the said A. T. Caperton shall hereafter, at any time, acquire any property whatever in slaves, or make use of slave labor.

3d. That the said A. T. Caperton first pay all costs which may have accrued in any proceeding instituted or pending against his person or property before the date of the acceptance of this warrant.

4th. That the said A. T. Caperton shall not, by virtue of this warrant, claim any property, or the proceeds of any property, that has been sold by the order, judgment, or decree of a court, under the confiscation laws of the United States.

5th. That the said A. T. Caperton shall notify the Secretary of State, in writing, that he has received and accepted the foregoing pardon.

In testimony whereof I have hereunto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this seventh day of September, A. D. 1865, and of the independence of the United States the ninetieth.

ANDREW JOHNSON.

By the President:

[U. S. SEAL.] WILLIAM H. SEWARD,
Secretary of State.

UNITED STATES OF AMERICA,
Department of State.

To all to whom these presents shall come, greeting:

I certify that the paper hereto annexed is a true copy of the original on file in this Department.

In testimony whereof I, William H. Seward, Secretary of State

32 of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington this eleventh day of September, A. D. 1865, and of the independence of the United States of America the ninetieth.

[SEAL OF DEPARTMENT OF STATE.] WILL. H. SEWARD.

WASHINGTON CITY, *September 11th*, 1865.

Hon. WILLIAM H. SEWARD, *Secretary of State.*

SIR: I this day receive the pardon of the President of the U. S. and accept the same, with the conditions therein expressed.

Very respectfully, your ob't serv't,

A. T. CAPERTON.

DISTRICT OF COLUMBIA.

County of Washington, ss:

I, A. T. Caperton, of Monroe County, West Virginia, do solemnly swear, in presence of Almighty God, that I will henceforth faithfully support, protect, and defend the Constitution of the United States, and the union of States thereunder; and that I will, in like manner, abide by and faithfully support all laws and proclamations which have been made during the existing rebellion, with reference to the emancipation of slaves; so help me God.

A. T. CAPERTON.

Sworn to and subscribed before me this the 12th day of September, A. D. 1865. N. CALLAN,

[NOTARIAL SEAL.] *Notary Public.*

33 I certify the above is a true copy of an original oath, sworn to and subscribed before me, this 12th day of September, A. D. 1865.

[NOTARIAL SEAL.] N. CALLAN,
Notary Public.

[5-ct.stamp.]

To the introduction of which said pardon as evidence the plaintiff, by his counsel, objected, and the court sustained the objection and ruled out the pardon as evidence; to which opinion of the court, the defendant, by his counsel, excepted, and prayed that this his exceptions may be signed, sealed, and made a part of the record; which is done.

N. HARRISON. [SEAL.]

Bill of Exceptions.—No. 4.

On the trial of this cause, after evidence had been introduced tending to show that at the time of the acts complained of in the declaration, in 1862, the defendant was confederate provost-marshal of the county of Monroe, appoined as such by Gen'l Heth, then commanding the confederate forces in this department, (which included the county of Monroe,) upon the recommendation of the county court of Monroe, then a court in rebellion against the Government of the United States, and recognizing and acting under the authority of the so-called Confederate States, and of the State of Virginia, which was then one of the said States, and then coöperating and aiding in the said rebellion, and that the justices

who composed the said court were also hostile to the Government of the United States, and gave aid and comfort to the rebellion by their judical acts as well as otherwise; and, after evidence had been
34 offered tending to show that the property mentioned in the declaration was seized, confiscated, and publicly sold by Wilson Lively, confederate assistant provost-marshal of Monroe County, by order of the defendant as provost-marshal as aforesaid, claiming to have authority to direct such seizures and sales by a general order from the confederate headquarters at Dublin, requiring the provost-marshal of Monroe to confiscate and sell the property of all citizens who abandoned their homes and went within the Federal lines; that the said property, in the absence of William Ballard, who had been compelled to abandon his home and to enter the Federal lines on account of his loyalty to the United States, was publicly sold, for confederate money, and that at the said sale that John C. Ballard and one other of the now legatees or distributees of the said William Ballard (who was then living, but afterwards died) purchased a portion of said property and paid the price thereof in confederate money to said Wilson Lively, who conducted the sale as assistant provost-marshal as aforesaid. And also, after the plaintiff had offered the following transcipt from the records of Monroe county, to show his qualification as administrator of W'm Ballard, deceased, on the day of , 1866, which is in the words and figures following:

At Monroe County circuit court, April 25th, 1866.

Administration on the personal estate of William Ballard, dec'd, is granted to William A. Ballard, who appeared in court and was sworn as such, and, together with John C. Ballard and Patrick H. Hawkins as his securities, entered into and acknowledged a bond in the penalty of $3,000, conditioned according to law, certificate for obtaining letters of administration of the personal estate of the said William Ballard, in due form is granted him.

Copy. Teste:

LEWIS CALLAWAY, *Clerk.*

35 And also, after the defendant in order to show that, on the 16th Feb'y, 1863, the above-named John C. Ballard, a son of William Ballard, dec'd, qualified as administrator of his said father before the aforesaid county court of Monroe, (then engaged in rebellion as aforesaid,) offered the following order of the said court to that effect:

Monroe County court, Feb'y 16, 1863.

Administration of the estate of William Ballard, dec'd, is granted unto John C. Ballard, who made oath as administrator, and, together with George Loudermilk and Ja's W. Johnson his securities, entered into and acknowledged his bond in the penalty of $2,000, with condition according to law, letters of administration in due form is granted him.

Copy. Teste:

LEWIS CALLAWAY,
Clerk Monroe Co., Cir. Ct.

And also, after evidence had been introduced by the defendant tending to show that on the day of , the said John C. Ballard, as

administrator as aforesaid, had received from and receipted to said Wilson Lively, assistant provost-marshal as aforesaid, for $, in confederate money, which said receipt is as follows:

PRO. MARS'L OFFIC*f*,
Union, Va., May 30, 1863.

Col. WILSON LIVELY, *Ass't Pro. Mar.*

SIR: Please pay to the order of John C. Ballard, administrator of William Ballard, deceased, seven hundred and ninety-four dollars and nineteen cents, the net proceeds arising from the sale of the said William Ballard's property by the police.

A. A. CHAPMAN,
Pro. Marshal Monroe Co.

Above writing endorsed:

36 Received from Wilson Lively the amount of the within order, July 20, 1863.

J. C. BALLARD.

On account of the proceeds of the sale aforesaid, which had been ordered by the confederate war department at Richmond, by an order addressed to the provost marshal of Monroe County, to be restored to the administrator of said William Ballard. Also, evidence tending to show that the three justices who composed the county court of Monroe, which made the aforesaid order of 16th Feb'y, 1863, had been lawfully commissioned as justices by the governor of Virginia, in 1860, and were acting under such commission in 1863, but were then acting as rebel justices, and in aid of the rebellion, and as members of a court then in rebellion as aforesaid against the Government of the United States. And that at that time also, the county of Monroe was under martial law as proclaimed by Jefferson Davis, then president of the southern confederacy, and was in the actual occupation of a portion of the confederate military forces.

Thereupon the defendant, by his counsel, moved the court to give the following instructions to the jury:

1st. If the jury believe from the evidence that, on the 16th of Feb'y, 1863, administration of the estate of the plaintiff's intestate was committed to the hands of one John C. Ballard, by the county court of Monroe, composed of three justices who held their commission under the authority of the Commonwealth of Virginia, issued to them in the year 1860, that such appointment was sufficient to authorize said Jno. C. Ballard to act as such administrator, and there could be no other appointment subsequent thereto until the said appointment was set aside by a court of competent jurisdiction.

2d. That if the plaintiff is entitled to recover at all in this case, the amount of $, which was paid to John C. Ballard
37 by Wilson Lively, on the of , 1863, ought to be deducted therefrom by the jury.

3d. If the jury believe from the evidence that the legatees or distributees of the estate of William Ballard, deceased, at the sale of the property by Wilson Lively, purchased any part thereof, and paid for the same in confederate money, and afterwards had the said confederate money returned to them by said Lively, then the plaintiff cannot recover in this action for such property.

4th. Unless the jury believe from the evidence that the defendant, in person, committed the trespass set forth in the declaration, or allowed,

directed, asserted, or advised some one else to commit the same, then they must acquit the defendant.

5th. If the jury believe from the evidence that Wilson Lively received his appointment as assistant provost-marshal of Monroe County from Gen. Heth; that he acted independently of the defendant; made his reports directly to Gen. Heth's headquarters at Dublin, and that he committed the trespasses complained of of his own accord and on his own responsibility, and not in concert with, or in obedience to any instructions of the defendant, then the jury should acquit the defendant.

The court refused to give the 1st instruction as asked for, and, in lieu thereof, instructed the jury that if, on the 16th Feb'y. 1863, when the appointment of John C. Ballard as administrator of W'm Ballard, deceased, was made by the county court of Monroe, that court was in rebellion against the Government of the United States, and was composed of justices who were then engaged in giving aid and comfort to the rebellion, by levying supplies to enable the southern confederacy to carry on the war, and otherwise, then the judicial acts and proceedings of said court were null and void, and their appointment of John C. Ballard, as administrator, conferred no legal authority upon him to act as such; and that it was not necessary to set aside or revoke an
38 invalid order of such a court, in order to give effect to the plaintiff's appointment as administrator, which was made by a competent tribunal.

2d. The court refused to give the second instruction—1st, because the confederate money paid by Wilson Lively to John C. Ballard was no legal compensation for the property taken and sold by the said Lively, if taken and sold unlawfully; 2d, because John C. Ballard had no legal authority to receive and receipt for the proceeds of said sale, whether in good or bad money, although, in assuming to act as administrator, and although he may be liable himself as administrator de son tort, that does not relieve the defendant from any liability, upon his part, to the rightful administrator of William Ballard for any wrongful taking and conversion of the intestate's property, done by the defendant, or by his order and authority. The court refused to give the third instruction because the fact that some of the legatees and distributees of William Ballard (who was then alive) may have attended the said sale, and, in compliance with its terms, purchased a portion of the property, and paid for it in confederate money, cannot affect the right of the proper personal representative of said Ballard afterwards to sue and recover for any unlawful taking and sale of said property, so far as the heirs or distributees of said Ballard are concerned. It is fair to presume that they involuntarily attended said sale *to* simply to save what they could from the wreck of their father's estate, and to provide for his family in his absence.

The court gave the fourth and fifth instructions as asked for.

To this opinion of the court refusing to give the three first instructions as asked for, and in giving the above additions or modifications in lieu thereof, the defendant, by his counsel, excepted, and his exceptions are signed, sealed, and made a part of the record.

N. HARRISON. [SEAL.]

39 *Defendant's petition referred to on page* 17, *and made a part of the order of July* 18, 1867.

To the Hon. N. Harrison, judge of the circuit court of Monroe:

The petition of A. T. Caperton respectfully represents that there are

now on the docket for trial at this term of the court five suits against him for alleged trespasses, viz: One by Philip Boyer, one by Nicholas Martin, one by Jno. A. Brown, against him and others, and two by W'm Ballard's administrator.

Your petitioner is satisfied that he cannot have a fair and impartial trial of said suits in this county, and he asks a change of venue for the following reasons:

1st. That during the late war he acted as confederate provost-marshal for the county of Monroe, and that all the suits above mentioned arose out of his acts as such officer; and that, on account of the duties which devolved on him as such officer, and which he performed, a very great and deep-seated prejudice was engendered against him among those who now make up the competent jurors for said county.

2d. That during the present term of the court four suits against him have been tried, involving questions growing out of the exercise of his office aforesaid, almost identically similar to those involved in the suits yet to be tried, and the results of said trials were such as not only to satisfy your petitioner, but a large number of impartial persons, that prejudice and ill-will must have influenced the minds of most of the jurors who rendered verdicts in those cases.

3d. That the various plaintiffs in the suits already tried, and those to be tried, have large family connections in said county; that heretofore, in almost every case that has been tried, the jurors have been composed in part of persons who were the relatives of those who had similar suits, either against your petitioner or others, and your petitioner is apprehensive that such will be the case in the suits hereafter to be tried.

4th. That the president of the board of supervisors, who assisted in drawing the annual list from which the jurors were to be selected, has a similar suit against another party now pending in this court.

5th. That the sheriff of this county, who has the selection of any special jury, has similar suits pending in this court, and is related to several parties who have had, and now have, similar suits in this court.

6th. That there are now some twenty-five suits, including those against your petitioner, for trespasses, growing out of similar transactions, which have contributed to awaken and intensify the feelings of prejudice before referred to, and which connect with them such a number of the relatives of the plaintiffs as to render the circle of unbiased and unprejudiced men quite small.

In consequence of the requirement of the test oath the number of competent jurors in the county compared with the number of male citizens over the age of twenty-one, does not exceed one-eighth of the same, and consequently the range of selection is quite limited.

Your petitioner refers to the affidavits accompanying this petition, which he prays may be read, and for the reasons herein set forth he prays that the said causes may transferred to some other county within the circuit for trial.

All of which is respectfully submitted.

A. T. CAPERTON.

Sworn to in open court July 17th, 1867.

LEWIS CALLAWAY,
Clerk.

Affidavits filed by defendant and made a part of the order of July 18, 1867. (*See page* 17.)

The undersigned having had full opportunities for ascertaining
41 the condition of the public mind with reference to certain trespass suits brought by various persons against A. T. Caperton, esq., have no hesitation in declaring it as our firm belief that, owing to the prejudices excited against said Caperton by his having exercised the office of provost-marshal in this county during the war among that class of men who now make the qualified jurors he cannot obtain a fair and impartial trial of said causes by any jury likely to be selected in this county.

M. McDANIELS.
A. H. JOHNSON.
SAM'L R. HOUSTON.
B. F. STEELE.
J. M. ROWAN.
JOHN W. LANIUS.
JOS. ZOLL.
S. J. WARREN.
THO'S F. PARKE.
GEORGE. W. CLARKE.
JAMES A. SHANKLIN.
WILLIAM C. BABER.
W'M SMITH.
JA'S G. KEADLE.
R. R. HOUSTON.
JOHN McCREERY.
J. L. LYNCH.
WILLIAM L. SYDNOR.
E. JAMESON,
JACOB ZOLL.
J. W. DAVIS.

Sworn to before me this 17th day of July, 1867.

LEWIS CALLAWAY,
Clerk Monroe Co. Cir. C't.

The undersigned members of the bar, practising in the circuit court of Monroe, have seen much and have heard much of certain tresspass suits, which are now being prosecuted in said court against A. T. Caperton by various parties, and have no hesitation in affirming, as our decided belief, that, in the present condition of things, it is almost impossi-
42 ble for him to obtain a fair and impartial trial on account of the prejudice and bias of the qualified jurors of this county.

FRANK HEREFORD.
C. A. SPERRY.
A. G. TEBBETTS.

Sworn to in open court July 17th, 1867.

LEWIS CALLAWAY,
Clerk.

Affidavits filed by plaintiff and made a part of the order of July 18, 1867, (*page* 17.)

The undersigned citizens of the county of Monroe, having learned that an application has been made to the Hon. N. Harrison, judge of the circuit court, by one Allen T. Caperton, to change the venue of certain cases in which the said A. T. Caperton is defendant, for various reasons assigned by the said Caperton in a petition presented by him, in which, among other things, the said Caperton has sworn that he believes such bias and prejudice exists against him among the registered voters and competent jurors of the said county, as would prevent his receiving justice in said suits, and believing that such affidavit and petition contain

an unwarrantable reflection upon the character and integrity of the registered voters and competent jurors of the said county, upon their solemn oaths say, that they believe no such bias or prejudice exists among the said jurors or voters against the said Caperton, as will prevent their doing him justice upon the evidence adduced in the cases before referred to.

C. H. HARVEY.
ARCHIBALD CALES.
JORDAN GRIMET.
DAVID BRAGG.
JAMES P. ROLLYSON.
JACOB GRIMET.
HIRAM MCHOGSHEAD.
JAMES BUCKLAND.
JOSIAH BEASLEY.
H. O. SMITH.
JOHN HUNTER.
G. W. BRUFFY.
SAMUEL DEHART.

43 Subscribed and sworn to before me, July 17th and 18th, 1867.
LEWIS CALLAWAY, *Clerk.*

Proclamation of Jefferson Davis referred to in defendant's bill of exceptions, No. 1, is in the words and figures following, to wit:

WAR DEPARTMENT, ADJ'T AND INSPECTOR GENERAL'S OFFICE,
Richmond, March 29, 1862.

[General Orders, No. 18.]

The following proclamation is published for the information of all concerned:

Proclamation.

By virtue of the power vested in me by law to declare the suspension of the privilege of the writ of habeas corpus:

I, Jefferson Davis, president of the Confederate States of America, do proclaim that martial law is hereby extended over the counties of Greenbrier, Pocahontas, Bath, Alleghany, Monroe, Mercer, Raleigh, Fayette, Nicholas, and Randolph; and I do proclaim the suspension of all civil jurisdiction (with the exception of that enabling the courts to take cognizance of the probate of wills, the administration of the estates of deceased persons, the qualifications of guardians, to enter decrees and orders for the partition and sale of property, to make orders concerning roads and bridges, to assess county levies, and to order the payment of county dues,) and the suspension of the privilege of the writ of habeas corpus in the counties aforesaid.

In faith whereof I have hereunto signed my name and set my seal this 29th day of March, in the year one thousand eight hundred and sixty-two.

[SEAL.] (Signed) JEFFERSON DAVIS.

44 II. Brigadier General Henry Heth is charged with the due execution of the foregoing proclamation; he will forthwith establish an efficient military police, and will enforce the following orders:

All the distillation of spirituous liquors is positively prohibited, and the distilleries will forthwith be closed. The sale of spirituous liquor of any kind is also prohibited, and establishments for the sale thereof will be closed.

III. All persons infringing the above prohibition will suffer such punishment as shall be ordered by the sentence of a court-martial, provided that no sentence to hard-labor for more than one month shall be inflicted by the sentence of a regimental court-martial, as directed by 67th article of war.

By command of the Secretary of War.

(Signed) S. COOPER,
Adjutant and Inspector General.

A true copy from the records of Monroe circuit court, in case of W'm Ballard's administrator, against Allen T. Caperton.

Teste:

LEWIS CALLAWAY, *C. C. M. C.*

Fee of clerk of circuit court for this record, $15 60.

45 WEST VIRGINIA, *ss:*

At a supreme court of appeals held in the city of Wheeling, on the 11th day of March, 1870:

ALLEN T. CAPERTON, PLAINTIFF IN ERROR,
vs.
WILLIAM A. BALLARD, ADMINISTRATOR OF William Ballard, deceased, defendant in error.

Upon a writ of supersedeas to a judgment of the circuit court of Monroe County, rendered on the 22nd day of July, 1867.

The court having maturely considered the transcript of the record of the judgment aforesaid, together with the argument of counsel thereupon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment. Therefore, it is considered by the court that the judgment aforesaid be affirmed, and that the defendant in error recover from the plaintiff in error damages
46 according to law, together with his costs about his defence in this behalf expended, which is ordered to be certified to the circuit court of Monroe County.

I certify that the foregoing is a copy of the record in the case of William Ballard's administrator adv. Allen T. Caperton, as the same remains in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court the 11th day of March, A. D. 1870.

[SEAL.] SYLVANUS W. HALL,
Clerk of the Supreme Court of Appeals of West Virginia.

I, James H. Brown, presiding judge of the supreme court of appeals of West Virginia, hereby certify that the foregoing is in due form, this March 11, 1870.

J. H. BROWN.

47 THE STATE OF WEST VIRGINIA:

At a supreme court of appeals held in the city of Wheeling on the 8th day of February, 1869:

ALLEN T. CAPERTON, PLAINTIFF IN ERROR,
vs.
WILLIAM BALLARD'S ADM'R, DEFENDANT IN error.

Upon a writ of supersedeas to a judgment of the circuit court of Monroe County.

This day came the plaintiff in error, by Messrs. Lee and Boggess, his counsel, and the defendant in error, by Messrs. Stanton & Allison, his counsel, and this cause was partly heard upon the transcript of the record of the judgment aforesaid, and is continued until to-morrow for a further hearing.

And at another day of said court continued and held on the 9th day of February, 1869:

This day came again the parties, by their counsel, and this cause was fully heard upon the transcript of the record of the judgment
48 aforesaid and the argument of counsel, but because the court is not advised of its judgment to be given, time is taken to consider thereof.

And at a term of said court held on the 11th day of March, 1870:

ALLEN T. CAPERTON, PLAINTIFF IN ERROR,
vs.
WILLIAM A. BALLARD, ADMINISTRATOR OF William Ballard, deceased, defendant in error.

Upon a writ of supersedeas to a judgment of the circuit court of Monroe County, rendered on the 22d day of July, 1867.

The court having maturely considered the transcript of the record of the judgment aforesaid, together with the arguments of counsel thereupon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment. Therefore, it is con-
49 sidered by the court that the judgment aforesaid be affirmed, and that the defendant in error recover from the plaintiff in error damages according to law, together with his costs about his defence in this behalf expended, which is ordered to be certified to the circuit court of Monroe County.

I, the undersigned, clerk of the supreme court of appeals of West Virginia, do certify that the foregoing is a copy of the record and proceedings in the case of Allen T. Caperton, plaintiff in error, vs. William Ballard's adm'r, defendant in error.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court at Charleston, the 18th day of October, A. D. 1870.

[SEAL.] SYLVANUS W. HALL, *Clerk.*

50 *Opinion of court.*

ALLEN T. CAPERTON
vs.
WILLIAM BALLARD'S ADM'R.

The first, second, fourth, and seventh errors assigned in this case considered, and the suggestions by them answered in the case of Caperton vs. Martin, infra, and therefore it will be unnecessary to consider them.

The third error assigned is, because no issue was made up on the defendant's additional plea, No. 6.

It purports to be a plea of accord and satisfaction with the administrator of the plaintiff, by the payment to him of a certain sum which, it is alleged, was the proceeds of the sale of the property described in the declaration, which was received and accepted by the said administrator in full satisfaction of the trespass complained of, and prays judgment, &c.

The plaintiff, it appears, filed a special replication to this plea,
51 traversing the fact that the sum of money mentioned in the plea, or any part thereof, was ever paid to the lawful administrator of the plaintiff's intestate, or to any other person having authority to receive the same, and concludes to the country.

It does not appear, however, that any issue was made upon the replication, by adding the similiter or rejoinder. When a plea, replication, or subsequent pleading concludes to the country, the adding of the similiter being all that is necessary to complete the issue, the omission to do so is not error after verdict, which will avail in the appellate court. But it is otherwise taken; the plea, replication, &c., concludes with a verification, and without anything more, a trial is had, and a verdict or judgment rendered, without any issue on such plea or replication. (B & O. R. R. Co., vs. Faulkner, to be hereafter reported. Code 1860, ch. 181, sec. 3.)

The fifth assignment of error, is the ruling of the court in excluding evidence of the contents of a certain letter written by the defend-
52 ant to Wilson Lively, mentioned in the defendant's first bill of exceptions.

From all that is disclosed in the record, I do not think any error was committed in rejecting the evidence referred to; nor do I think the letter in question, if produced, would have been pertenant evidence, or have any effect whatever on the question before the jury. It appears that the property in controversy was sold under the defendant's authority, or by his permission and acquiesence. And the measure of damages being the value of the property, it is not perceived how a letter written by him to his deputy, by whom the sale was conducted, directing a postponement of the sale, which sale the defendant, nevertheless, allowed to be made, whereby his liability was fixed, could help him, or have any influence on the verdict of the jury.

The next objection, which is assigned as error, is embraced in the defendant's second bill of exceptions, and relates to what was said by
53 the court in the presence of the jury, in the delivery of its opinion in refusing the evidence offered of the contents of the letter from the defendant to Lively, before referred to, in reference to its knowledge of the official relations existing between the defendant and Lively, and the latter's subordinate position under the former, at the time of the trespass complained of.

It appears, however, that the court at the same time instructed the

jury, and explained to the counsel, that what had been said on this point was not evidence in the cause, nor intended to be, or to have any effect whatever on the deliberations of the jury, but that what was said was only intended to illustrate the opinion of the court, then being delivered, and that the jury must disregard the same.

If the impropriety of the statements of the court referred to were conceded, still I fail to discover any sufficient grounds for reversing the judgment, from anything disclosed in the bill of exceptions we are now considering.

54 The remaining error complained of, which we are required to consider, relates to the action and ruling of the court on the first, second, and third instructions asked by the defendant and set forth in his fourth bill of exceptions.

The first instruction was refused and another given in lieu thereof. The other two were refused and no others given in their stead. As to the first, I think it was clearly inadmissible, and that the one given in lieu of it properly propounded the law, and consequently there was no error in refusing the one and giving the other.

The second, I think, was also properly refused. It involves the question of the validity of a settlement by accord and satisfaction of a debt or demand due the estate of a decedent by an executor, de son tort, as against the rightful executor or those legally authorized to receive payment or to make such settlement. The proposition, I think, is untenable.

55 It is well settled that an executor, de son tort, so far as he is concerned himself, will be bound by and held responsible for all his acts as such. And those who deal with him as such, knowing his true character, may likewise be bound by their dealings with him. But it cannot, it seems to me, be so as to the rightful executor and others interested, except in so far as his acts are proper and legal, unless they have assented to or acquisced in the illegal acts and proceedings of such wrongful executor, otherwise an irresponsible party would have it in his power to seize on an estate and by fraud and collusion convert it to his own use—a position, in my judgment, wholly indefensible. If such executor would have the right to collect the debts of a decedent for the legitimate purpose of paying the funeral expenses, for instance, or the payment of debts generally, he would, in my judgment, have no right to compound or release the same, or anything else that would prejudice the right executor or others interested in the

56 estate. And as the executor, de son tort, in this case could not have sued the defendant and recovered in this case in the name of the decedent, William Ballard, I think it must follow that he had no authority to settle by accord and satisfaction, or to release the cause of action, to the prejudice of the rightful executor or administrator. (2 Tucker, 414.

The third instruction, in my view, involves a more difficult proposition than the two preceding. It is in these words: "If the jury believe from the evidence that the legatees or distributees of the estate of William Ballard, deceased, (the former owner of the property in controversy,) at the sale of the property by Wilson Lively, purchased any part thereof, and paid for the same in confederate money, and afterwards had the said confederate money returned by said Lively, then the plaintiff cannot recover in this action for such property." If it was shown by the evidence in the cause or could be justly implied from anything in the record that the property referred to in the in-

57 structions was in point of fact purchased in by the legatees or distributees of the owner, William Ballard, and was held by them

for the benefit of the estate, and there being, at the time of the sale, no legal representative of said estate, I would think there would no such a case of a conversion of the property thus purchased as would make the defendant liable for the same.

But it appears from the record that William Ballard, the owner, was then living, and, in legal contemplation, the sale to his children must be regarded, in the absence of evidence, that they purchased for the father, or that the property was in fact returned to or came into his possession, as a sale to any other person, and consequently a legal conversion of the property by the defendant to his own use.

Upon the whole, I am of opinion to affirm the judgment with costs and damages.

WEST VIRGINIA, *ss:*

58 I, the undersigned, clerk of the supreme court of appeals, do certify that the foregoing is a copy of the opinion of said court of appeals, and is a part of the record in the case of Allen T. Caperton vs. William Ballard's adm'r.

Given under my hand the 10th day of December, 1870.

SYLVANUS W. HALL,
Clerk Court of Appeals, West Virginia.

(Indorsed:) 1870, Dec. term, Sup. Court U. S. No. 370. Caperton vs. Ballard, &c. Opinion of court. Filed 12 December, 1870.

(Indorsement on cover:) No. 370. Allen T. Caperton, plaintiff in error, vs. William A. Ballard, adm'r of William Ballard, dec'd. West Virginia sup. c't of appeals. Filed 9th December, 1870.

SUPREME COURT of the UNITED STATES.

DECEMBER TERM, 1871.

No. 165 and No. 166.

ALLEN T. CAPERTON, Plaintiff in Error,
AGAINST
PHILIP BOWYER, Defendant in Error.

The Same, Plaintiff in Error,
AGAINST
Wm. A. Ballard, Adminis'r of Wm. Ballard,
Defendant in Error.

Writs of Error to Supreme Court of Appeals of West Virginia.

As to power in time of war; power of pardon; and powers of the respective governments of the States and the United States as to passing, dispensing with or suspending statutes of limitation.

H. Polkinhorn & Co, Printers, D st, near 7th, Washington.

Supreme Court of United States.

DECEMBER TERM, 1871.

Nos. 165 and 166.

No. 165.
ALLEN T. CAPERTON
Plaintiff in error
against
PHILIP BOWYER,
Defendant in error.

No. 166.
THE SAME
Plaintiff in error
against
WM. A. BALLARD,
Adm'r of
WM. BALLARD.
Defendant in error,

From Supreme Court of Appeals of West Virginia.

Abstract of the cases.

In the Circuit Court of Monroe county, in West Virginia, two actions were brought the 11th of May, 1866, against the plaintiff in error for acts alleged to be injurious: one (No. 165,) to person; the other (No. 166,) to property. In the former the plea marked 7, (being the 5th *special* plea,) p. 7, and in the latter plea No. 4, p. 7, set forth the circumstances under which those acts were done; showing particularly, that they were as provost marshal of the county of Monroe, under the then *de facto* government. Demurrers were sustained (p. 10,) to these

pleas, (p. 9;) and also to a plea of pardon by the President of the United States, (p. 8 in No. 165, and p. 9 in No. 166.)

In No. 166, (p. 8,) plea No. 1 denies, that the plaintiff is administrator of, &c., of William Ballard; and plea No. 2 is more special on that subject. After oyer of the supposed letters of administration granted to the plaintiff on the 25th of April, 1866, it alleges that long before the grant of said supposed letters, to wit: "at the regular term of the court for Monroe county for February, 1863, the said court duly granted letters of administration of the estate of the said William Ballard, deceased, to John C. Ballard, who made oath as administrator, and together with George Loudermilk and James W. Johnson, his securities entered into and acknowledged a bond in the penalty of $2,000 conditioned according to law, and letters of administration were, in due form, granted him." The plaintiff joined issue on the first plea. To the second he put in a replication which alleges that "the letters granted in February, 1863, were letters granted by a court in rebellion against the government and rightful authority of the United States, and were null and void," and concludes to the country. The last plea being No. 6, p. 10, alleges "that after the committing of the supposed grievances in the declaration mentioned, and before the commencement of the suit, to wit: on the 20th day of July, 1863, the net proceeds arising from the sale of the goods and chattels in the declaration mentioned, to wit: the sum of $794.19 was paid to the then administrator of the goods and chattels of the said William Ballard, deceased, for and in full satisfaction and discharge of the grievances in the declaration mentioned and the net proceeds, he, the said then administrator, then and there accepted and received in full satisfaction and discharge of the said greivances." The plaintiff re-

plies "that neither on the 20th day of July, 1863, nor at any other time was the sum of $794.19, the alleged proceeds in the said plea mentioned, or any part thereof, paid to the lawful administrator of William Ballard, deceased, or to any other person having authority to receive the same;" and of this he puts himself upon the country. At the trial of the issues there were bills of exceptions to opinions of the court—1st, as to evidence, (pp. 12, 13, 15, and 16;) 2d, as to statements in the jury's presence, (pp. 13, 14;) and, 3dly, to the court's refusing to give the instructions asked, and giving other instructions, (pp. 18, 19.) After which there was a verdict for plaintiff for $1,258 damages; and judgment therefor (p. 12,) was affirmed in *Caperton* vs. *Ballard*, 4 West Va. Rep., 420.

In No. 165 are pleas marked 3d, 4th, and 5th, (pp. 6, 7,) being the 1st, 2d, and 3d special pleas, showing that the action was not brought within the time prescribed by the statute of limitation nor within such time as is allowed by any exceptions thereto; the first of these pleas being that the action "was not brought within *one year* next after the right to bring the same accrued;" the next being that it was not brought within *two years* next after such right accrued; and the other plea being that *more than two years* had elapsed after such right accrued, and before the first day of March, 1865.* To each of these pleas there is put in something called a replication, wherein, the plaintiff says: 'that he ought not to be barred,' 'because, he says, that his said action is not barred,' (pp. 8, 9.) It is said as to the two last pleas, that issue thereon is joined,' (p. 8.) The defendant hav-

* When the legislature of West Virginia enacted that "in computing the time within which any civil suit proceeding or appeal shall be barred by any statute of limitations, the period from the 17th day of April, 1861, to the date of the passage of that act shall be excluded from such computation," Sess. Acts, p. 72.

ing demurred to the so-called replication to the other, it is said, the plaintiff to that demurrer "rejoins generally and puts himself upon the country, and the defendant likewise," (p. 9.) After which the court overruled the demurrer, and held the replication sufficient in law, (pp. 10, 11.) The court also sustained (p. 10,) a demurrer (p. 9,) to the plea marked 6th, (being the 4th special plea,) which avers "that at the time of the supposed grievances laid to this defendant's charge, the plaintiff and this defendant were citizens of the State of Virginia, and resided in that State, and the whole time of limitation prescribed for this action by the law of the State of Virginia had run while this defendant resided in that State, and before the first day of March, 1865.* Then there remaining to be disposed of the general issue of not guilty as well as the pleas marked 4 and 5, (being the 2d and 3d *special* pleas,) a jury was sworn to try the issues (p. 11,) and opinions at the trial are excepted to.

In each case it appears that the Circuit Court would not permit the President's grant of pardon to be given in evidence, either in justification of the acts complained of, or *in* mitigation of damages, (No. 165, p. 12, *et seq.*; No. 166, pp. 14, 15;) and in No. 165 it further appears that as to the statute of limitations the court refused to give such instructions as were asked for; and, on the contrary, instructed the jury that in computing the time "the jury ought to exclude from the computation all that period of time between the 7th † day of April, 1861, and 27th day of February, 1866;‡ and that "if the jury

*When, as before mentioned, an act in relation to the statute of limitations was passed by the legislature of West Virginia.

†There is no ground whatever for excluding from the computation the period of time between the 7th and the 17th of April.

‡The enactment by West Virginia of this date, was that "in computing the time within which any civil suit in trespass or case shall be debarred by any statute of limitation, in the counties of Pendleton, Hardy, Grant, Monroe, &c., the period from the first day of March, 1865, to the date of the passage of this act shall be excluded from such computation," Sess. Acts, p. 92.

believe from the evidence that the cause of action arose in 1862, as alleged in the declaration, then it is not barred by either of the statutes of limitations," (p. 20.) Under the influence of these opinions there was a verdict for plaintiff. Exceptions were filed to the opinion overruling a motion to set aside the verdict, (p. 14 to 16.) Whereupon judgment was entered for the damages assessed and the costs, (p. 11.) And that judgment was affirmed, *Caperton* v. *Bowyer*, 4 West Va. Rep., 176. The nature of the points adjudged is also stated in the opinion and certificate of the court, pp. 22, 23, (*Armstrong &c.* v. *Treasurer*, 16 Peters, 286.)

Points and authorities.

1. "Use appropriates the term of *civil war* to every war between members of one and the same political society." "The sovereign indeed never fails to term *rebels*, all subjects openly resisting him; but when these become of strength sufficient to oppose him, so that he finds himself compelled to make war regularly on them, he must be contented with the term of *civil war*." Vattel, § 292. The terms *rebels* and *pirates* were freely applied by George the 3d. and the British parliament to the Americans who were engaged in defending themselves and their families and property against Great Britan between 1775 and 1783. Yet when it was argued before this court as to that war, that till the declaration of independence, it was only a civil war, there was uttered from its bench this language: "But why is not a defensive war against Great Britan (call it if you will a civil war) to be conducted on the same principles as any other? If it was a civil war, still we do not allow it to have been a rebellion—America resisted and became thereby engaged in what she deemed a just war. It was not the war of a lawless banditti; but of freemen fighting for

their dearest rights, and of men lovers of order and government. Was it not as necessary in such a war as in any between contending nations, that the law of nations should be observed?" *Penhallow &c.*, v. *Doane's ad'rs.*, 3 Dall., 110. Such language is no less applicable to other wars of "freemen fighting for their dearest rights and of men lovers of order and good government." 6 Rob. Prac., ch. 12, § 5, p. 272 to 274. Especially is it applicable to the war waged by men of the Southern States, from the Spring of 1861 to the Spring of 1865—a war, "which all the world acknowledges to be the greatest civil war known in the history of the human race." *Prize cases*, 2 Black, 669. "That civil war was carried on upon a vast scale against the Government of the United States for more than four years." The power which carried it on "was recognized as supreme in nearly the whole of the Territory of the States confederated "against that government." *Thorington* v. *Smith*, 8 Wallace, 7. The two cases last cited and others occurring in the interval between them, (*The Circassian* 2 Wallace, 148; The *Venice* Id. 174; *Mrs. Alexander's cotton*, Id. 419; *Mauran* v. *Ins. Co.*, 6 Id., 13, 14,) may be regarded as consistent with the law of nations that "whenever a numerous party thinks it has a right to resist the sovereign, and finds itself able to declare that opinion sword in hand, the war is to be carried on between them in the same manner as between two different nations." Vattel, § 294. The government of such party, whether called by publicists a government *de facto* or denominated by this court, a government of paramount force, must, this court has said, "necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrong doers for those acts, though not warranted by the laws of the rightful government." *Thorington* v. *Smith*, 8 Wallace, 9.

In the present suit, the 7th plea in one case (No. 165,) and the 4th plea in the other case (No. 166,) show that at the time of the supposed grievances laid to the charge of the party sued, he and those under whom he acted "were *in fact*, whatever they may have been *in theory*, subjects of another government, and, as such, enemies of the United States, and in arms against them." *Merchants Ins. Co.*, v. *Edmond, &c.*, 17 Grat., 143. Those pleas do not raise the question discussed in *Hood &c.*, v. *Maxwell*, 1 West Va., Rep., 241—whether a State has the constitutional right to secede from the Union, but they present defences supported by decisions both in England. (*U. S.* v. *McRae*, Law Rep., 8 Eq. Cas. 74;) and this country, as to the existence during the late civil war of a *de facto* government other than the Government of the United States; and the extent to which individuals acting under that *de facto* government have a right to be protected against the actions of other individuals. The Court of Appeals of Kentucky views very much as the Court of West Virginia does the abortive attempt to dissolve the Union. *Hoskins &c.*, v. *Gentry &c.*, 2 Duvall, 286. But its views on that subject are deemed by it quite consistent with its course as to attorneys in *Ex parte Tenney*, Id. 356; and surgeons in *Rayns adm'r* v. *Smith*, Id. 431; and other cases as to those who had been officers or soldiers in the Confederate army. In accordance with well established principles, it holds that under the authority of such a government as that of the Confederate States there might be acts which if done without such authority would be piracy at sea, or felony or trespass upon land, but being done under such authority, according to the usages of war, are neither the one nor the other. *Hughes* v. *Litsey*, 5 Am. Law Reg., N. S., 148. Accordingly it was adjudged that in a county of Kentucky, occupied and controlled by a Confederate army, under

the command of *Gen. Buckner*, the forcible capture of a non-combatant citizen's horses, in conformity with military authority, and in execution of a military order, was *not* a criminal offense cognizable by the civil power of the State; for the plain reason that the act being *belligerent* in the legal import of that comprehensive term, it was not robbery in the technical sense. *Com.* v. *Holland*, 1 Duvall, 182. The acts of John Morgan and his band of Confederate soldiers have, on several occasions been recognized as the acts of belligerents in a civil war. *Bland* v. *Adams Express Co.*, 1 Duvall, 232. When it was argued that a party by acting in the capture of Mount Sterling, helped to 'pave the way' to robbery, *Robertson*, J., in delivering the opinion of the court, (in 1866,) said, the capture of the town "was not forbidden, but allowed by the laws of war between antagonist parties recognized as belligerents. It may be admitted that, had there been no capture of the town there would have been no robbery of the bank, and so likewise, had there been no unconstitutional secession, there would have been no rebellion; and had there been no civil war there would have been no such plunder of the bank. Hence the assumed and perverted principle which would make the appellant responsible, would hold equally liable all the agitators who excited the rebellion, or helped its cause in either a civil or military capacity. This is too much. But this logical argument, *ex absurdo*, is a satisfactory refutation of the only plea urged in support of the judgment." *Witherspoon* v. *Farmers Bank*, 2 Duvall, 498. By these and other cases it is established that an action cannot be maintained against a man for an act done according to the usages of war, in the exercise of those military rights which the laws of nations recognize as pertaining to international belligerents. *McKrelle* v. *Metcalf*, Id. 533. Hence in the same year (1866,) there was a dismission of

a petition claiming damages for horses taken, in the exercise of a belligerent right for the use of Morgan's army. *Price* v. *Poynter*, 1 Bush, 387; and a judgment also against the plaintiff in a suit for the destruction by Morgan of cars on the Louisville and Nashville rallroad, when the act was for crippling the enemy and cutting off his supplies; it being considered that this act was, according to the laws of civil war, a lawful exercise of a belligerent right. *Robertson*, J. said, "the admitted laws of all civilized warfare entitle each party in a civil war to the same right of capture or destruction of enemy's property, and show that when either the capture or destruction of property by one of such belligerents is lawful, it is equally lawful by the other; and if unlawful by one it would be equally so by the other." *Bell* v. *Louisville and Nashville R. R. Co.*, 1 Bush 406.

The principle of these and other cases (*Smith* v *Brazelton*, 1 Heiskell, 44, 2 Am. R., 688,) is supported by the legislature of West Virginia, in its enactment of the 1st of March 1871* but was disregarded by the court below, when it sustained the demurrer to the pleas in question, and gave the opinions mentioned in No. 165 in bill of exceptions No, 2, p. 14, and mentioned in No. 166 in bills of exception No. 1 and No. 2, pp. 12, 13, and No. 4, p. 19. This last bill shows the proceedings of the county court of Monroe on the 16th of February, 1863, were held null and void. This decision is not supported by the act of Congress for the admission of the State of West Virginia into the Union. For this act

*"That no person who aided in the late war between the government of the United States and a part of the people thereof, on either side, shall be civilly or criminally held liable, found guilty, convicted, have his property taken, sold, or damaged, imprisoned or hurt, because of any act done according to the usage of civilized warfare, in the prosecution of said war, by either of said belligerents, unless the Constitution shall, or further than it shall, require such action." Sess. acts., p. 261, ch. 213.

was not to take effect until after the proclamation of the President of the United States therein provided for, and indeed was only to be in force "from and after sixty days from the date of said proclamation." (Sess. acts 1862–3, p. 634;) and the proclamation bears date 20th April, 1863. (Sess. acts 1863–4, appendix No. 2.) The decision seems to spring from some notions about 'a court in rebellion,'—a court composed of justices 'who were then engaged in giving aid and comfort to the rebellion.' It might as well be decided that the judicial proceedings of every county court in Virginia, in *February*, 1863, were void; that not only in Monroe but in the other counties of the State there could *then* be no valid probate of a will, or grant of administration, or qualification of guardian, or decree for the partition or sale of property, or orders to assess a county levy or pay a county due! Nay, more, that neither the county court or its clerk could then admit a deed to record, nor the clerk issue a marriage license! *Texas* v. *White*, 7 Wallace, 733, was lately cited from the bench in support of a remarkable conclusion,—which, in a suitable place, may be the subject of comment. On the present occasion it is deemed sufficient to observe "that acts necessary to peace and good order among citizens," are in, *Texas* v. *White*, "regarded in general as valid when proceeding from an actual" government, and "transactions in the ordinary course of civil society," such as appear here, find further support in *Thompson* v. *Smith.*, 8 Wallace, 12. According to these cases, the court below should have held valid the grant of administration on the 16th of February, 1863; and should have held invalid the subsequent grant on the 25th of April, 1866. 3 Rob. Va. Pract., 420 to 428; *Fisher* v. *Bassett &c.*, 9 Leigh 119; *Brownley's Reps.* v. *Duke &c.*, 2. Rob. Va. R., 102; *Schultz* v. *Schultz &c.*, 19

Geat., 378; *Hutchison* v. *Preddy*, 12 Ib., 90; *Andrews* v. *Avery &c.*, 14 Id., 236; *Wood's adms.* v. *Neeson's adms. &c.*, 9. B. Monroe, 604; *Comstock* v. *Crawford*, 3 Wal., 403.

Not only the decision on the pleas, but also the opinions excepted to, involve questions giving this court jurisdiction;' (*Mackay &c.* v. *Dillon*, 4 How., 447;) there being drawn in question the construction of several clauses of the Constitution of the United States * as insisted on hereafter in the fourth point.

II. The Constitution of the United States, art. 2 § 2, clause 1, giving power to the President "to grant reprieves and pardons for offences against the United States," and he having made a grant of full pardon for all offences, (p. 13 of No. 165,) "all the consequences that followed from the said offences are also pardoned thereby." *Cole's* case Plowd., 401. That grant which

* In art. 1, § 8, clauses 11, 12, 13, 15, 16, as to the power of Congress 'to define and punish offences against the law of nations;' 'to declare war,' 'and make rules concerning captures on land;' 'to raise and support armies;' 'to make rules for the government and regulation of the land and naval forces;' 'to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;' 'and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States;' and the construction of clause 2 in sect. 10 of same art., declaring that "no State shall, without the consent of Congress, keep troops or ships of war *in time of peace*, enter into any agreement or compact with another State, or with a foreign power, or *engage in war unless actually invaded*, or in such imminent danger as will not admit of delay;" and the construction of art. 4, §4, that "the United States shall guarantee to every State in this Union a *republican* form of government, and shall protect each of them against *invasion*;" and these sections and clauses must be construed consistently with those declaratory and restrictive clauses for which a desire was expressed at the time of the adoption of the Constitution, and which were then proposed as amendments thereto, (4 Elliott's Debates, p. 227 of ed, 1830,) and became such on being ratified; whereof the 9th Article declares that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people:" and the 10th article declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

was made in September, 1865—before the institution of these suits—may bar an action for any act constituting such offence, as a pardon for defamation may bar a suit for such defamation. *Hall's* case, (*Cooke* v. *Hall*,) 5 Rep., 51; *Strickland* v. *Thorp*, Cro. Jac., 207, 1 Brownl., 211, Yelv. 126; *Wat's* case, Cro. Jac. 335. After the general pardon in 7 Jac., one was not allowed to say of a person embraced in the pardon, that he had (at a time which preceded that pardon) stolen sheep; for when the pardon came "it took away not only *pœnam, but reatum*, for felony is *contra coronam et dignitatem regis*"—"The king's pardon doth not only clear the offence itself, but all the dependencies, penalties and disabilities incident unto it." *Cuddington* v. *Wilkins*, *Hob.* 81*b*. The English courts would not allow "a new invention," "to take away the benefit of the pardon" in *Davis* v. *Hawkins*, Winch. 125; and granted a prohibition in *Mrs. Peel's* case, Cro. Car. 11; Hetley 107. The pardon availed as a defence in *Cudrington* v. *Redman*, W. Jones, 227; S. C. *The King* and *Codrington* v. *Rodman*, Cro. Car. 198; *Tombes* v. *Ethrington*, 1 Lev., 121; 1 Saund., 363*a*, cited in *Rex* v. *Johnson*, 3 Mod., 241. In 9 Will., 3, it is again affirmed "that whenever a crime is pardoned, all the effects and consequences thereof are discharged." The court say, "power of pardoning being inseparably annexed to the crown, and not grantable over, the king thereby pardoning this offence before the fine actually imposed, whereby an interest would have vested in the grantee, the offence was thereby gone, and thereby the penalty depending thereon discharged." *Rex* v. *Greenvelt*, 12 Mod., 119; 1 Ld. Raym, 214. In 1 Ann, the pardon was not allowed to be frustrated by charging the party with an action. *Reg.* & *Foxworthy*, 7 *Mod.*, 153.

In the present cases it is clear that the pardon was a valid exercise of authority under the United States.

U. S. v. *Padelford*, 9 Wallace, 542. And the decision of the Circuit Court is against its validity or against the exemption set up under it. If the pardon could be pleaded in bar, there was error in sustaining the demurrers to the 8th plea in No. 165, (p. 8,) and the 5th plea, in No. 166, (p. 9). If it could not be so pleaded, then (as is insisted on in No. 165, in bill of exceptions No. 1, p. 12, and in No. 166, in bill of exceptions No. 3, pp. 14, 15,) the court erred in not admitting the pardon in evidence under the general issue in mitigation of damages. 6 Rob. Pract., ch. 41, § 3, p. 657 to 660; Id. p. 854, § 2; *Ballard* v. *Leavell*, *&c.*, 5 Call, 531; *Chinn* v. *Morris*, 2 C. & P., 361, 12 Eng., C. L.; *Beard* v. *Head*, 3 Dana, 493; *Rowcliffe* v. *Murray*, *&c.*, 1 Car. & Marshm. 513, 41 Eng. C. L.; *Perkins* v. *Vaughan*, 4 Man. & Gr. 988, 43 Eng. C. L.; *Linford* v. *Lake*, 3 H. & N., (Excheq.,) 276. As to the right to rely in the appellate court on this error, see *Mackay*, *&c.* v. *Dillon*, 4 How, 447.

III. When it is said "that a right is vested in a citizen," it is meant "that he has the power to do certain actions; or to possess certain things, according to the law of the land." *Chase*, *J.*, in *Calder* v. *Bull*, 3 Dall., 394. "Every law that takes away, or impairs rights vested agreeably to existing laws, is retrospective, and is generally unjust." S. C. 391. "It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact." *Paterson*, J., in S. C., 397. The argument of *Kent*, C. J., in *Dash* v. *Van Kleeck*, 7 Johns., 505 *et. seq.*, with which *Story*, J., was disposed to go a great way, (*Society*, *&c.* v. *Wheeler*, 2 Gall., 139,) is supported in subsequent cases. *Merrill* v. *Sherburne*, *&c.*, 1 N. Hamp., (Adams,) 213; *Bedford* v. *Shilling*, *&c.*, 4 S. & R., 203; *Sturges* v. *Crowinshield*, 4

Wheat, 207; *Bates* v. *Kimball*, 2 Chipman, 88; *Prop. Ken. Purchase* v. *Laboree, &c.* 2 Greenl., 294; *Lewis, &c.* v. *Webb*, 3 Id., 335; *Durham* v. *Lewiston*, 4 Id., 143; *Staniford* v. *Barry*, 1 Aiken, 314; *Eakin, &c.* v. *Raub, &c.*, 12 S. & R., 340, 343, 360, 362, 363; *Woart* v. *Winnick*, 3 N. Hamp., 482; *Martindale* v. *Moore*, 3 Blackf., 282; *Murray* v. *Gibson*, 15 How., 421. The decision of this court in *Ogden* v. *Blackledge*, 2 Cranch., 279, was thought to imply that if the time prescribed by the statute of limitations had expired before the repeal of the statute, the suit would have been barred. It is so held in Indiana. In that State in 1847, according to the plea, whilst the old statute was in force, and before the suit was commenced, the plaintiff's right of action was barred by that statute: it was held that no statute subsequently passed could renew the defendant's liability. *McKinney* v. *Springer*, 8 Blackf., 507. There was a like ruling in 1851. *Stipp* v. *Brown*, 2 Carter, 648. And other authorities concur. Ang. on Lim. 22, 23 *note;* Smith's Com. on Stat. and Const. Law, § 359, p. 517 *et seq.*

It is obliged to be so, for the simple and familiar reason that when the statute of limitations has once run against a debt or other cause of action, that cause of action is gone; and if in respect thereto, an action can be afterwards maintained, it can only be because of something which *creates a new cause of action.* Thus, in the case of a debt when a new acknowledgment is relied on, "the acknowledgment, if it is to operate at all, is to create a new cause of action, to revive a debt which is extinct, and thus to give an action which has its life from the new promise implied by law from such an acknowledgment and operating and limited by its purport. It is then, in its essence, *the creation of a new right*, and not the enforcement of an old one." *Bell* v. *Morrison &c.*, 1 Peters, 373, 374; 1 Rob. Prac., ch. 93, § 5, p. 552; Id., ch. 99, § 6, p.

586. As was said by this court in 1862, the lapse of time limited by such statutes not only bars the remedy but it *extinguishes the right.*" *Leffingwell* v. *Warren*, 2 Black., 605.

Consequently when the statute of limitations has once run against a cause of action for any matter,—when that cause of action is gone, because action was not brought for that cause within the time prescribed by the statute that was in force while the right of action for such cause subsisted—if an action be maintained afterwards for such matter by reason of a new statute, it must be held that this *new* statute operates "to create a new *cause* of action; to revive a" cause "which is extinct; and thus to give an action which has its life from the new" statute. "It is then, in its essence the creation of a new right, and not the enforcement of an old one."

The court below has, in effect, so held. *Caperton* v. *Martin*, 4 West Va., 150 to 152; Id. 165 to 168. For under the constitution of West Virginia, art. 11, clause 8, expounded in *Faulkner's* case 1 West Va. Rep. 282, the 11th section of ch. 149 of the code of Virginia (p. 593 of code of 1849, p. 638 of edi. 1860,) continued to be the law; and in No. 165 the declaration is of a matter *not* of such nature that in case a party died, it could be brought by or against his representative. 3 Rob. Pract., ch. 60, p. 288, *et seq*; and being for a matter not of such nature was, by said 11th section of ch. 149 required to be brought within *one year* next after the right to bring the same accrued. 1 Rob. Pract., ch. 87, § 6, p. 471; code of West Va., ch. 104, § 12, p. 549; and by the demurrers (which the court sustained) it is admitted as alleged in the 3d plea (being 1st *special* plea) that the action was not brought within *one year* next after the right to bring the same accrued; and there is a further admission of

what is alleged in the 6th plea, (being 4th *special* plea,) mentioned *ante* p. 3. Now the government of the State of Virginia, which, from the adoption on the 29th of June, 1776, of the constitution of the State,* had been the lawful government, was also the actual government of the territory within the county of Monroe at the time of the supposed grievances for which the action is brought. *Thorington* v. *Smith*, 8 Wallace 8. The statutes of this State, adopting the common law of England, and prescribing the time within which an action might be maintained are obliged to be looked to for a rule of decision in respect to those grievances. And it is admitted that at the time thereof, the plaintiff and the defendant were citizens of that State and resided therein, and the whole time of limitation prescribed for this action by the law of that State had run while the defendant resided therein, and before the first day of March, 1865. That being so there would be ground to maintain that the action would be barred even if it were brought in a State (completely foreign to Virginia) which had not adopted her statute. 1 Rob. Pract., ch. 62, § 2, pp. 328, 329; Id ch. 104, § 9, p. 622; *Shelby* v. *Guy*, 11 Wheat, 371; *Howell* v. *Hair*, 15 Alaba, 199. But here, as already mentioned, the statute of Virginia has, by express adoption of West Virginia, been continued as the law of the latter State, in like manner as it was formerly continued by Kentucky. *Thompson* v. *Caldwell*, 3 Littell, 138.

Moreover, upon the pleas numbered 4th and 5th (2d and 3d *special* pleas) the court at the trial held as stated *ante* p. 4, and thus allowed the plaintiff below the benefit of all that was enacted and *more than was enacted* in the act of the

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* "The first written constitution of a sovereign State among men." Grigsby's Discourse on Va. convention of 1776, pp. 19, 20, and 165, 166.

1st of March, 1865, and also the benefit of a subsequent act passed February 27, 1866.*

In Mississippi, in 1835, it was considered "clear that the moment the remedy was gone, by the running of the statute, the right was gone also, and a right to set this lapse of time up as a defence vested in the opposite party, and he could not be deprived of the privilege without his consent, by subsequent legislation." *Davis* v. *Minor and Wife*, 1 How., (Miss.) 189. *Sharkey*, C. J. said: "The statute does not pretend to give rise to new contracts and liabilities arising out of the old ones, nor to create new considerations as resulting from the previous ones; but if its operation be in favor of the plaintiff it must change the condition of the parties in relation to former contracts by vesting in one a right which he had lost, to the prejudice of the other—by taking from him a defence which he had acquired; thus operating directly on a state of facts which existed at the time, and, indeed, long prior to the date of its passage. If such be its operation, it would destroy the legal presumptions which had become operative in favor of the defendant by fixing a liability on a foundation which had been destroyed and become invalid by these presumptions." S. C. 191. In Massachusetts in 1836, *Putnam*, J., said: "The rights of the defendant were ascertained and fixed before this last statute passed, and *he cannot thereby be deprived of them*. *Battles, &c.* v. *Forbes*, 18 Pick. 532, 19 Id., 578. Subsequently in that State an action brought after the revised statutes went into operation could not be maintained (in 1843) upon a contract on which an action would have been barred by the old statute if such action had been

* "In computing the time within which any civil suit in trespass or case shall be debarred by any statute of limitation in the counties of Pendleton, Hardy, Grant, Monroe," &c., (some other counties are named in the act,) "the period from the first day of March, 1865, to the date of the passage of this act shall be excluded from the period of such computation." Sess. acts., p. 92.

brought at any time after 1832, and before the revised statutes took effect. *Wright* v. *Oakley, &c.*, 5 Metcalf, 405. A like doctrine was maintained in Arkansas in 1846. *Couch* v. *McKee*, 6 Arkansas, (1 Eng.,) 495; and in Vermont in 1847. *Wires, &c.* v. *Farr*, 25 Verm., 46; and in other States in cases cited in Cooley's Const. Lim., p. 365 ch. 11; it being thereby held that "the legislature cannot remove a bar or limitation which has already become complete." *Bigelow, C. J.*, in *Bigelow* v. *Bemis*, 2 Allen, 497; *Prentice* v. *Dehon*, 10 Id., 353; *Ball* v. *Wyeth*, 99 Mass., 339; in other words, that in respect to a cause of action which was barred before the new statute went into operation, such new statute shall have no effect. *Girdner* v. *Stephens*,1 Heiskell, 280; 2 Am. R., 704.

Although in the suits now before the court, the action was doubly barred—barred first under the original statute of limitations, and barred again after the passage of the act of the 1st of March, 1865; yet the party against whom judgment was given, may, unless it be reversed, be deprived of property (and perhaps of liberty) 'without due process of law," contrary to the principles of *magna charta*. 2 Inst., 45 *et seq; Murray's lessee* v. *Hoboken Land and Improvement Company*, 18 How. 276; and contrary to the constitution of the United States. Although the first series of amendments to that constitution, including art. 5, operated merely as restrictions upon Federal power, (*Fox* v. *Ohio*, 5 How, 434); yet, the 14th amendment provides among other things that no state shall "deprive any person of life, liberty, or property, without due process of law." 14 Stat., 358, No. 48; 15 Id., 708. According to judicial construction of this language, the legislature of West Virginia could not by a retrospective statute divest the right to the defence, which was complete under the previous statute, and give a new right of action. *Burch* v. *Newbury*, 10 N. Y.; 6 Selden, 396, 397;

Parsons v. *Russell*, 11 Mich., 113; *Ames* v. *Port Huron Company*, *Id.* 139; *People* v. *Frisbie*, 26 Calif. 139. The Supreme Court of Wisconsin in 1860 held that it was *not* competent for the legislature by the statute of 1859 to renew the right of the former owner to bring the action, he having already effectually lost it, and deprive the opposite party of a defence which he had secured by possession under his tax deed. *Sprecker* v. *Wakely*, *&c.*, 11 Wis., 438. That court holds "that if the time limited by statute for commencing a suit for the recovery of the possession of lands sold for taxes expires, while the statute is in force, and before the suit is brought, that the right to bring the same is barred, and no subsequent legislation can renew that right;" that it was not competent to the legislature to divest the right thus acquired. *Hill* v. *Kricke*, Id. 446; that they could not by a repeal of the Statute or otherwise restore the right and give a remedy to enforce it. *Dixon*, *C. J.*, said, "The right being gone, of course the remedy fell with it; and as there could be no remedy without a corrrsponding right, it was useless for the legislature to restore the former, so long as it was prohibited by the constitution from interfering or meddling with the latter." *Knox* v. *Cleveland*, 13 Wisc. 249.

Hence the acts of March 1, 1865, and February 27, 1866, so far as they are construed to affect rights vested before either of those acts was passed are unconstitutional. It was so held in Maine in 1862. *Atkinson* v. *Dunlap*, 50 Maine, 6 Hubbard, 117; and again in Wisconsin in 1867; the court approving the language in that case, which, while admitting the constitutional jurisdiction of the legislature over remedies, declares that, "after all existing remedies have been exhausted, and rights become permanently vested, all further interference is prohibited." *Davis*, *&c.* v. *Menasha*, *&c.*, 21 Wisc., 495.

A like doctrine is maintained in Alabama in the same year, (1867.) *Carleton & Slade* v *Goodwin's exec.*, 41 Ala., 157; and in Tennessee in 1870. *Girdner* v. *Stephens*, 1 Heiskell, 280, 2 Am. Rep., 780. All of these cases accord with the decision of this court, that when the constitution secures to a citizen the right of "acquiring, possessing, and enjoying property," it "cannot, by a mere act of the legislature, be taken from one man and vested in another directly; *nor can it, by the retrospective operation of law, be indirectly transferred from one to another, or be subjected to the government of principles in a court of justice, which must necessarily produce that effect.*" *Webster* v. *Cooper*, 14 How., 503, 504. The provision of the constitution intended to secure the liberty and property "of the citizen cannot be evaded by the form in which the power of the State is exerted." *Cummings* v. *State of Missouri*, 4 Wallace, 319.

If, however, the validity of any such retrospective statute could, by any sound reasoning, be sustained, then "it is competent for the legislature to repeal any act upon which a suit has been brought, and if the repeal is absolute, such suit is at an end." *The People* v. *Livingston*, 6 Wend., 530. Indeed this is recognized and affirmed in *Caperton* v. *Martin*, 4 West Va., 166. And here there is such repeal by the act of March 1, 1871, cited ante p. 8 note, which may operate, although it was passed after these suits were instituted. For the State "violated no contract with the parties; it merely regulated the proceedings in its own courts and limited the jurisdiction it had before conferred." *Beers* v. *State of Arkansas*, 20 How., 529. Although that act was passed since the judgment of the court below, it may nevertheless influence the judgment of this court. *Hollingsworth, &c.* v. *Virginia*, 3 Dall., 378; *Exparte McCardle*, 7 Wallace, 506.

Whether the act of March, 1871, be enforced or not, yet when it is shown, as is already done, that the acts passed by West Virginia on the first of March, 1865, and 27th of February, 1866, are repugnant to the constitution of the United States and invalid, as it regards the defence under the statute of Virginia, (ch. 149, § 11, p. 593 of code of 1849, p. 638 of edi. 1860,) continued as law by the constitution of West Virginia, art. 11, clause 8, this statute so continued as law cannot lawfully be *dispensed with* or *suspended* by the executive or judicial department of the government of that State, or by any department of the Government of the United States, legislative, executive, or judicial.

Whatever may have been the practice at an earlier period,—however, much the dispensing or suspending power claimed by the sovereign of Great Britain may, in Mr. *Hume's* words, have been "aided by the servility of the courts of judicature,"* yet, in 1672, Sir *Orlando Bridgman*, "the lord keeper, refused to affix the great seal to the declaration for *suspending* the penal laws."† and the *illegality* of such suspension had become fully established‡ even before the trial of the seven bishops, (which Mr. *Macaulay* has so graphically described ‖) and other events which make "the 30th of June, 1688, a great epoch in history."§ Then followed the bill of rights of 1689 (1 W. and M., Session 2 ch. 2,) wherein it was declared 1. That the pretended power of *suspending* of laws, or the execution of laws by legal authority, without consent of Parliament, is illegal; 2. That the pretended power of

1688

* Hume's Engl., ch. 70, vol. 6, p. 307, of N. Y. edi., 1851.

† He was "for that reason, though under other pretenses, removed from his office." Id., ch. 65, vol. 6, p. 96.

‡ Macauley's Eng., chap. 6, vol. 2, p. 66, of Phila. edi., 1856.

‖ Id., chap. 8, p. 262, *et seq.*

§ Id., chap. 9, p. 279.

dispensing with laws, or the execution of laws, as it hath been assumed of late is illegal;" and (after other clauses:) 13. "That no declarations, *judgments*, doings, or proceedings, to the prejudice of the people, in any of the said premises ought in any wise to be drawn hereafter into consequence or example." And afterwards it was enacted (in § 12) that "no dispensation by *non obstante* of, or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, *except a dispensation be allowed of in such statute.*"*

A principle like that established as to the *executive* was settled as to the *judicial* department by the courts of Queen's Bench and Common Pleas,—settled soon after the restoration of that King whose father's life had been taken during the great civil war. However judges may have erred before, they did not after that restoration assume either because of the war that had so long pre-

* The rights and liberties of the subject were much discussed early in the reign of Charles the First, and the discussion continued after a protracted civil war. To maintain sound principles of constitutional government, the pen proved a mightier weapon than the sword. Though civil government had been restored 27 or 28 years, yet arbitrary measures had not ceased in the reign of James the Second. Then (sixty-three years after Charles the First ascended the throne,) there came the peaceful revolution of 1688, and the bill of rights, wherein *John Somers* had so great a part, declaring that "the rights and liberties" which James the Second is charged with endeavoring "to subvert and extirpate," and which are "asserted and claimed in the said declaration are the true, avowed and undeniable rights and liberties of the people of this Kingdom." Familiar with that State paper and the history of all that gave rise to it, that great statesman, *George Mason*, no less wise in counsel than able in debate,—who stood by the side of *Patrick Henry* in many a contest,—was the draftsman of "a declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity as the basis and foundation of government;" the seventh article whereof declares "that all power of suspending laws or the execution of laws, by any authority, without consent of the representatives of the people is injurious to their rights, and ought not to be exercised. This is one of several articles unanimously adopted the 12th of June, 1776. Code of Va., pp. 32 to 34, of edi. 1849; Grigsby's Discourse on the Va. convention of 1776, p. 19 and p. 162 to 165. The provision in the declaration of rights of Massachusetts, art. 20, is cited in *Holden* v. *James*, 11 Mass., 404; and that in the Constitution of Indiana, in *Griffin* v. *Wilcox*, 21 Indiana, 384.

vailed, or the execution of the British king, to *dispense* with or *suspend* the operation of a statute. In the former court in 13 Car., 2, was an action wherein there was not and could not be any question of confiscating a debt due an enemy; the action being not for any *debt* whatever, but for an alleged *wrong*, to wit: trespass for assault, battery and imprisonment; and the defendant, averring that the trespass, assault and imprisonment were done the 29th of October, 1655, pleaded the statute of limitation, to which the plaintiff replied that *certain rebels had usurped the Government* and none of the King's courts were open. On demurrer to the rejoinder it was argued "that the statute of limitations is not pleadable because there being a stop of justice and no legal court held, none was bound to prosecute, especially for such an imprisonment as here in those times." But 'judgment was given for the defendant by the whole court,' they adjudging that the statute of limitations was a bar, and the replication sufficient. And the reason they gave was, because "*there is not any exception in the act of such a case;* and infants had been bound (thereby,) if they had not been excepted." *Predeaux* v. *Webber*, 1 Lev., 31. The investigation in the common pleas in the succeeding year (1664,) of the same question was more profound than any which it has received either before or since that year. It was by Sir *Orlando Bridgman* of whom Lord Chancellor *Nottingham* declared that "it is due to the memory of so great a man, whenever we speak of him to mention him with reverence and veneration for his learning and integrity." In the case before him wherein there was a plea of the statute of limitations, the plaintiff replied that there was not until 29th of May, 12 Car., 2, "any court of chancery *domini regis Angliæ*, out of which an original could be sued out. Neither *fuit aliquod domini regis magnum sigillum in quo talia brevia sigillari potuerint.* Nor any other

court *domini regis de recordo* in which he could prosecute by writ or bill against the defendant until the said 29th of May, 12 Car., 2, was open; and that he sued out his writ within six years after the 29th of May, 12 Car., 2." *Benyon* v. *Evelyn*, Bridgman, 328. In the rejoinder "the defendant (not denying there was no great seal of the King,) sets forth there was a court of chancery, of upper bench, of common pleas and exchequer open at Westminster, *congruistemporibus*, during all that space, so that the plaintiff might have freely brought his action; and sets forth the breach of the act of the continuance of process, (12 Car., 2, ch. 3,) whereby the process of these courts in that time are made good; but affirms not that they were the King's Courts, nor denies what the plaintiff said, that there was no court of chancery of the King, or other court of the King, open in that time. So, that now," (in the language of *Bridgman*, C. J.,) "it judicially appears as well by the pleadings itself, as by the act of parliament set forth in the record, that during all this space there were courts kept by usurpers under another style or *teste*, and no court of the King kept. So that now the point is, whether the plaintiff, not suing out his originals, or prosecuting the defendant during the time of usurpation of the government, when a court of chancery was open and justice between party and party was administered under usurpers; but no court of the King was then open; whether this shall be turned to a laches to the plaintiff, that the time of limitation shall incur during this time of usurpation." S. C., 328, 329. It was *held* that the words of the statute being express, 'that the action shall be commenced and sued within such a time and not after,' binds all persons whatsoever, (whatsoever the impediment may be,) after that time, S. C., 360; that the plaintiff being included in and so barred by the body of the act, "the proviso enumerating the

particular impediments, coverture, infancy, imprisonment, non-sane memory, and being beyond seas for which they are not tied up to that time of limitation till the impediments removed; it leaves all other cases and causes of impediments out of the letter of the proviso according to the reason of law, *exceptio probat regulam in casibus non exceptis*," S. C., 361. Speaking then of the particular impediment, viz: "that there was no court of the King, nor seal of the King since 1648, till his majesty's return,' Sir *Orlando Bridgman*, C. J., said "If that keep the action out of the statute of limitations, then all men that had cause of actions since 1648, and before his majesty's return, be they of what party soever, upon this ground may still have six years to be accounted from the 29th of May, 12 Car., 2, to sue in. But *expedit republicæ ut sit finis litium*, and it is better to suffer a particular mischief than a general inconvenience; and such a one must happen if way be given to equitable constructions against the letter of the act which is that they shall be sued within six years after the cause of action. But it rests not there, but adds, '*and not after*,' which negative words are the strongest words that can be in a law."—"The negative words exclude all time for bringing the action, but that which the statute doth expressly allow. S. C., 362, 363.

Such was the conclusion in respect to causes of action which arose in England during a civil war of much longer * duration than that which existed in this country from 1861 to 1865. That conclusion was arrived at by able jurists, unaffected by unsound reasoning as to war power; although under the British constitution the war power is

* Charles the First departed from London and went to York about the end of 1641; and the battle of Edgehill was in the following October. His execution took place January 30, 1649; the battle of Worcester was in September 1651. Oliver Cromwell died September 3, 1658. And Charles the Second entered his Capitol the 29th of May, 1660.

at least as great as that of either of the States which *did pass*, or of the Congress of the United States which *did not*, and constitutionally *could not* pass, the statute (taken from that of 21 Jac., 1, c. 16,) that is now in question; and indeed as great as the combined war power of the respective States, and the United States, whether regard be had to the powers delegated to the United States by the constitution or those reserved to the States respectively.

And though the volume of Bridgman containing the report of the ruling in *Benyon* v. *Evelyn* was not printed even in England until 1823, *yet there* that ruling has been constantly approved. *Lee* v. *Rogers*, 1 Lev., 110; *Hall* v. *Wybourn*, 2 Salk., 420; 15 Vin. Abr. tit. *Limitation* (T.) p. 125, pl. 6; 5 Bac. Abr., tit. *Limitation of actions* (E.) § 6, p. 238 of Lond. edi., 1832; Wilk. on Lim., 52; Darby & Bosanquet on Lim., ch. 1, § 23, p. 19; Angell on Lim., ch. 2, § 23, p. 18 (of edi., 1869,) note 3. It was often approved by *Holt*, C. J., and was recognized as authority in 12 Ann. *Aubry & Fortescue* 10 Mod., 206; and by Sir. *Wm. Grant* in 1810. He deemed it impossible to introduce into the law such an exception as was relied on before him in *Beckford* v. *Wade*, 17 Ves. 93; that being the appropriate function of a new statute operating prospectively, such as the English statute of 1 W. & M., cited in *Snode* v. *Ward* 3 Lev. 283, 2 Ventr. 197, and the American statutes cited in 1 Rob. Pract., ch. 105, p. 123.

After the statute of 21 Jac., 1, c 16, had in *Prideaux* v. *Webber* and *Benyon* v. *Evelyn*, been construed as before mentioned, Virginia (in common with most of the old States, 11 Wheat., 366,) adopted the language of that statute *with that construction*, and with such exceptions as are in 3 Hen. Stat. ch. 35, p. 381, *et seq.*; 5 Id., c. 9, p. 513, *et seq.* The statutes in 9 Hen. Stat., p. 215, § 3, Id.

430, c. 23; 10 Id 422, c. 9, § 2; 11 Id. p. 294, c. 41, § 2, Id. p. 340, c. 24, (*Hopkirk* v. *Bell*, 4 Cranch, 164,) were the acts of legislatures who knew of that construction and had regard to the principle then deemed sacred—that "though in many other countries, everything is left in the breast of the judge to determine, yet with us he is only to *declare* and *pronounce*, not to *make* or *new model* the law," * 3 Bl. Com., 327. A great judge had in 1765 expressed himself in this forcible language: "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly and passion to which human nature is liable." These striking words are ascribed to Lord *Camden* (in *Doe* v. *Kersey*, Pasch. 5, Geo. 3 1765, cited in Fearne on Rem., ch. 4, § 14, note p. 535 of 9th edi.,) and were uttered some years before Junius called upon him, in the name of the English nation to stand in defence of the laws of his country. Since then, Lord *Kenyon* has pronounced in appropriate and emphatic terms, the duty of a judge to be *dicere et non dare jus*, 3 Call. 349. Yet more recently it has been declared "there is no court in England which is intrusted with the power of administering justice without restraint." "The proceedings of all courts must take a defined course and be administered according to a certain uniform system of law, which in the general result is more satisfactory than if a more arbitrary jurisdiction was given to them." *Maule*, J. in *Freeman* v. *Tranach*, 12 Com. B. (3 J. Scott) 413, 74 Eng. C. L.

Where English statutes, such for instance as the statute of frauds and the statute of limitations, have been adopted

* *Quicquid judicis authoritati subjicitur, novitati non subjicitur.*—Novelties without warrant of precedents are not to be allowed: generally some certain rules are to be followed, 4 Inst. 66.

into our own legislation, the known and settled construction of these statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority. *Pennock, &c.* v. *Dialogue*, 2 Peters, 18. In delivering the opinion of this court in 1831, *Marshall*, C. J., said: "The rule which has been uniformly observed by this court in construing statutes is to adopt the construction made by the courts of the country by whose legislation the statute was enacted." Speaking of English statutes adopted in a State, he said: "The received construction in England at the time they are admitted to operate in this country, indeed, to the time of our separation from the British Empire may very properly be considered as accompanying the statutes themselves, and forming an integral part of them." *Cathcart, &c.* v. *Robinson*, 5 Peters, 280; *Kendall* v. *U. S.*, 12 Id., 625.

From the foundation of this government, down, at least, to the close of 1867, the statute of limitations was treated as a statute of repose, and neither this court nor any other court felt "at liberty to break in upon its general construction by allowing an exception *which has not acquired the complete sanction of authority.*" *Beatty adm'rs* v. *Burne's adm'r*, 8 Cranch, 108. The doctrine of this court was that it would not put upon the statute of limitations of a State, a construction not justified by the words of the statute; when its language did not vary essentially from the language of the statute of James, the construction of which had been well settled, that construction was followed. *Waldon* v. *Gratz's heirs*, 1 Wheat., 296. When the party sued showed there was such a length of time as by the general clause of the statute of limitation was a bar, it was a valid defence unless the plaintiff came "within some one of the exceptions or disabilities provided for by that statute." *McIver* v. *Ragan*, 2 Wheat., 29;

Somerville v. *Hamilton*, 4 Id., 233; *Bank of Alexandria* v. *Dyer*, 14 Peters, 145; *Sedgwick on Stat.*, ch. 7, p. 321. And he could only avail himself of a *ground of exception existing when the right of action first accrued.** *Mercer's lessee* v. *Selden*, 1 How., 52. In short, this court regarded it as settled that effect must be given to the statute of limitation according to its language; and that the court could not make an exception which the statute had not made. *Lewis* v. *Lewis*, 7 How., 782. And this was the doctrine alike of courts of the States† and of the United States. It was laid down in New York in 1823, that "it is not for the court to extend the law to all cases within the *reason* of it, so long as they are not within the *letter*," *Sacca* v. *De Graaf*, 1 Cow., 358; and in 1849 (following *Beckford* v *Wade*, 11 Ves., 86, and Angell on Lim., 144,) it was declared that "general words of a statute" "must receive a general construction, and unless there can be found in the statute itself some ground of restraining it, it cannot be restrained by *arbitrary* addition or retrenchment." *Bucklin* v. *Ford*, 5 Barbour, 394. The rule of *Beckford* v. *Wade*, and the cases there cited was distinctly recognized by this court in 1850; the court then saying of that rule: "It is the doctrine maintained in *Stowell* v. *Zouch*, found in Plowden's Reports, and not departed from by the

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* *Demorest* v. *Wynkoop*, 3 John., ch. R., 138.

† In Iowa, in 1868, *Dillon*, C. J., said: "We are agreed in holding that the provisions of our statute" "do not affect the common law rules of construing statutes of limitation. Those rules are: *First.* That the statute begins to run from the time the cause of action accrued. *Second.* That if the statute once begins to run, no subsequent disability will suspend it *unless the statute itself provides therefor*; and *third*, that before a cause of action accrues or the statute can begin to run, there must exist a cause of action, and a person authorized to prosecute it, as for instance, where a cause of action accrues to the estate of a deceased person, the statute will not commence to run until there is a personal representative in whose name it may be prosecuted." *Sherman* v. *Western Stage Co.*, 24 Iowa, 553. As to this, see 1 Rob. Prac., ch. 100, § 63, p. 589, *et seq.*

English courts, *even in cases of civil war, when the courts of justice were closed, and no suit could be brought. Bank of Alabama* v. *Dalton*, 9 How., 529. Yet more recently, to wit: in 1862, in a case not falling within any of the exceptions made by the statute of Wisconsin, *Swayne*, J., delivering the opinion of the Court, said: "We have no power to add to them. To do so would be to *usurp* the function of another distinct governmental department. It would be *legislation* and not adjudication." "It is our duty to apply the law—*not to make it.*" *Leffingwell* v. *Warren*, 2 Black, 605. That the statute is not to "be restrained by *arbitrary* addition or retrenchment," and that "no exceptions can be claimed in favor of particular persons or cases, unless they are expressly mentioned," was again affirmed in Wisconsin in 1865. *Woodbury* v. *Collins, &c.*, 19 Wisc. 60.

If contrary to the rule of law, established at least as early as 1664, and since maintained for more than two hundred years, there have, within a few years past, been cases wherein, by judicial *legislation*, instead of adjudication, the law has not been applied but *made*—cases wherein "the function of another distinct governmental department" has been usurped, and exceptions made by *arbitrary* addition—such cases ought not to be a rule of decision, but should be overruled as soon as practicable: the maxim of *stare decisis*, for which no regard has been shown in such cases should not be invoked in their support.

If the report in Bridgman of the ruling in *Benyon* v. *Evelyn* had been cited at the bar, or examined by the bench at Dec. T., 1867, in *Hanger* v. *Abbott*, 6 Wallace, 540, it might then have been seen that *that* ruling is fully and correctly reported, and that it has nothing to do with the doctrine as to confiscating debts due enemies, but is

equally applicable, whether the action is for a debt or only for a trespass or other wrong, as indeed the action was in *Prideaux* v. *Webber*. Yet in the case now before the court it may not be necessary in respect to *Hanger* v. *Abbott*, or *The Protector*, 9 Wallace, 687; *Levy* v. *Stewart*, 11 Id., 244, or *U. S.* v. *Wiley*, Id. 508, to make any further observation than this, that in those cases the real question was as to the rule of limitation of actions or proceedings brought *in courts of the United States;* and although the 34th section of the act of Congress of 1789, (1 Stat., 81; 1 Brightley's Dig., 792, § 3,) does "so far *as concerns rights of property*" furnish "the only rule that could be adopted by "those courts," and *the only one that Congress had the power to establish*," (*U. S.* v. *Reid*, *&c.*, 12 How., 363,) and although in trials at common law in civil cases in those courts, not only the statutes of the respective States prescribing rules of evidence, (*McNiel* v. *Holbrook*, 12 Peters, 89; *Sims* v. *Handley*, 6 How., 6; *Vance* v. *Campbell*, *&c.*, 1 Black, 430; *Wright* v. *Bales*, 2 Id., 537; *Ryan* v. *Bindley*, 1 Wallace, 68,) but also those prescribing the time within which action shall be brought (*Shelby* v. *Gay*, 11 Wheat., 367; *Ross*, *&c.* v. *Duval*, *&c.*, 13 Peters, 60,) have, under that 34th section, been generally a rule of decision, where they applied, yet it may be that where the time so prescribed has not expired Congress may treat the same as part of the *lex fori*, and make to the statute a new exception applicable to an action or proceeding brought in *a court of the United States.**

But supposing that to be so, it would not affect the present suits; they having been brought in a *court of a State.* The act of Congress of June 11, 1864, (13 Stat., c. 98, p. 123,) has no words to show that Congress meant to

* West Virginia has now by the code of 1868, ch. 104, § 18, p. 550, made a new exception applicable to an action hereafter brought in *a court of the State.*

assume the power of giving a *right of action in the courts of a State*, or prescribing the time of limitation of such action *in those courts*. In the absence of such words, it should not be construed as applying to such an action, when such construction is opposed to a rule which has constantly prevailed from the foundation of the government. If the act admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of Congress, it is the duty of the court to adopt the former construction. *U. S.* v. *Combs*, 12 Peters, 76. It is no less its duty on the other hand, if the act admits only of that other construction, to declare it void, so far as it transcends such constitutional authority.

Thirty-five years ago this court said "a uniform course of action, involving the right to the exercise of an important power by the State governments for half a century—and this almost without question—is no unsatisfactory evidence that the power is rightfully exercised." *Briscoe* v. *Bank of Com. of Kentucky*, 11 Peters, 318. This view has been often approved, *Conway &c.* v. *Taylor's executors*, 1 Black., 635. In accordance with the language of the federalist,* this court recently said of the States that "the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence and fulfilling the high and responsible duties assigned them in the Constitution, should be left free and unimpaired,"—"and more especially those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department and appointment of officers to administer their laws.

* "The States retain all pre-existing authorities which may not be exclusively delegated to the Federal head." This principle applies "with the same force to the judiciary as to the legislative power." Federalist vol. 2, pp. 323, 324, cited in 4 Dall. App. p. XXXI.

Without this power and the exercise of it," the court thought it risked "nothing in saying that no one of the States, under the form of government guaranteed by the Constitution, could long preserve its existence." *Nelson, J.*, observes that "all of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States." *Collector* v. *Day*, 11 Wallace, 126.

These sound fundamental principles are directly connected with a principle equally sound and fundamental as to the right of a State (independently of the Congress of the United States, and free from control by Congressional legislation,) to enact for what cause, there may be an action in the *Courts of the State*, and the time within which and the evidence by which such action may be maintained. The Supreme Court of Illinois lately said that "if our system of government is to remain as the wise and good men fashioned it, a strictly federative system, the States sovereign over all subjects within their proper sphere of action, as the general government is over all subjects confided to it by the Constitution, then no power exists in Congress to declare by law what shall *not* be evidence in a State court." *Latham* v. *Smith*, 45 Illinois, 30. This is not less true of a presumption (whether *prima facia* or conclusive) arising from a failure to bring an action within the time prescribed by the statute of a State, than of a presumption arising under a statute of a State of a different kind. The State which gives a right of action *in its own courts* can *alone* prescribe

in what time the action may be brought and by what evidence it may be maintained; doing therein nothing inconsistent with the supreme law.

Although the common law of England is in force in the State of Virginia, and also in the State of West Virginia, yet "the United States, as a federal government, have no common law." *Chase*, J., in *U. S.* v. *Worrall*, 2 Dall., 364. When in a suit in the courts of the United States, the common law has been received as the rule of decision, it has been received not as a law of the United States, prevailing with authority, through all equally and alike, but as the law of some particular State, by which the particular case was governed. The court does not adopt it as the common law of England or of the United States, but as the law of the State which has adopted it and made it its own." *Hopkinson*, J., in *Wheaton*, *&c.*, *Peters*, 8 Peters, 739, Appendix; *McLean*, J., delivering the opinion of this court in S. C., 658. *Kendall* v. *U. S.*, 12 Id., 621. If in the present suits there did ever exist a remedy by action for what is here alleged by one citizen of a State against another citizen thereof, such remedy springs not from the Constitution of the United States or any act of Congress, but from the common law of England adopted by the statute first of Virginia, (*Scott* v. *Lunt's adm'r.*, 7 Peters, 605,) and afterwards of West Virginia. And the remedy being thus derived altogether from the statute of the State, the party who invokes that remedy must take it with the restrictions imposed by such statute of that State (*Society* v. *Pawlet*, *&c.*, 4 Peters, 570,) as limits the time of bringing suit; constituting, as such statute does, a part of the *lex fori*; and "one of the most sacred and important of sovereign rights and duties." Such was the language of this court when *Marshall*, presided over it. *Barney's lessee* v. *Peters*, 5 Peters, 466; and when *Story* sat on the bench with

him. *Bank of U. S.* v. *Donnally*, 8 Peters, 372; or without him. *Observing* that the time after which suits or actions shall be barred has been from a remote antiquity, fixed by every nation in virtue of that sovereignty by which it exercises its legislation for all persons and property within its limits, this court in 1839, judicially declared that "our States, under our system, exercise this right in virtue of their sovereignty." *McElmoyle* v. *Cohen*, 13 Peters, 327. The rule of that case was maintained in 1850, *Bank of Alabama* v. *Dalton*, 9 How., 528; and again in 1857; *Grier*, J., in delivering the opinion of the court saying: "The case of *McElmoyle* v. *Cohen*, (13 Peters, 312) leaves nothing further to be said on this subject;" and holding that although "the authenticity of a judgment in another State and its effect are to be tested by the Constitution of the United States and acts of Congress," yet, that "rules of prescription remain as before, in the *full power of every State.*" *Bacon, &c.* v. *Henas*, 20 How., 25. This court may well consider that the case shown by the record here does *not* come within the act of Congress of June 11, 1864. 13 Stats. c. 98, p. 123; and that the decision of the Circuit Court does *not* rest on that act (p. 120.) But though it should not so consider, it is (notwithstanding, *Stewart* v. *Kahn*, 11 Wallace, 493,) insisted that the judgment of the court below cannot by force of that act be sustained without violating the restrictions upon federal power declared by the 5th, 9th and 10th, and other articles of the first series of amendments to the Constitution of the United States.

IV. Although the Government of the United States can, as this court has said, "claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or

given by necessary implication," (*Martin* v. *Hunter's Lessee*, 1 Wheat., 326,) yet the judicial power of the United States as defined by Art. 3, § 1, 2 of the Constitution is construed to extend to cases such as these (S. C. 334,) which, in the language of this court, "enter into the national policy, affect the national rights, and may compromit the national sovereignty," (S. C. 335;) and in respect to which has been felt "the importance and even necessity of *uniformity* of decisions throughout the whole United States." (S. C., 347, 348.) It seemed to *Marshall*, C. J., that "the necessity of *uniformity*, as well as correctness in expounding the Constitution and laws of the United States would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved, *Cohens* v. *Virginia*, 6 Wheat 415–16. And the same doctrine was maintained by his successor, *Ableman* v. *Booth &c.*, 21 How., 518.

In such cases this court determines for itself the construction and effect of any statute of a State brought under review, no matter what may have been the conclusion of the highest court of the State upon the subject. *Jefferson Branch Bank* v. *Skelly*, 1 Blach., 443; *Cummings* v. *State of Missouri*, 4 Wallace, 277; *Butz* v. *City of Muscatine*, 8 Id., 277.

In these suits the jurisdiction is clear both under the act of Congress of September 24, 1789, (1 Stat 89,) and that of February 5, 1867, § 2. *Stewart* v. *Kahn*, 11 Wallace 502. For there has been final judgment in the highest court of law of the State in which a decision in the suits could be had, where in the language of the former act there is drawn in question: 1st the validity of an authority exercised under the United States, and the decision is against its validity. *Matthews* v. *Zane*, 4 Cranch,

382; *Buel* v. *Vanness*, 8 Wheat, 312; *Ross* v. *Doe*, 1 Peters 664; *Harris* v. *Dennie*, 3 Id. 301; *Davis* v. *Packard &c.*, 6 Id. 48; *McKean* v. *Alexander*, 4 How. 20; *Neilson* v. *Lagow*, 7 Id. 772; *Kanouse* v. *Martin*, 15 Id. 198; *Lytle &c.*, v. *State of Arkansas*, 22 Id. 203; *Berthold &c.*, v. *McDonald &c.*, Id 339; *Carondelet* v. *St. Louis*, 1 Black, 188; *Maguire* v. *Tyler &c.*, Id. 202; *State of Minnesota* v. *Bachelder*, 1 Wallace 115, 116; *Buck* v. *Colbath*, 3 Id. 340; *McGuire* v. *Com.*, Id. 385; *Reichart* v. *Phelps*, 6 Id 165; and is drawn in question, 2dly the validity of a statute of, or an authority exercised under the State, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of such their validity. *Wilson &c.*, v. *Black Bird Creek Marsh Co.*, 2 Peters 250; *Satterlee* v. *Mathewson*, 2 Id. 410; *Weston &c.*, v. *City Council*, Id. 463; *Craig &c.*, v. *Missouri*, 4 Id. 440; *Worcester* v. *State of Georgia*, 6 Id. 541; *Curran* v. *State of Arkansas*, 15 Id. 320; *Furman* v. *Nichol*, 8 Wallace 57; and is drawn in question, 3dly the construction of a clause of the constitution and the decision is against the title, right, privilege or exemption set up and claimed under such clause of the constitution. *Bridge Proprietors* v. *Hoboken*, 1 Wallace, 142; *Greene* v. *Van Buskirk*, 5 Id. 310; or where in the varied language of the new act of February 5, 1867, § 2, (14 Stat. 386,) a title, right, privilege or immunity is claimed under the constitution, or any authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed under such constitution or authority. *Banks* v. *The Mayor*, 7 Wallace, 22; *Aldrich* v. *Ætna Co.*, 8 Id. 495; Peters v Lackawanna 45 N.Y. 27

Inasmuch as the case made out in the pleadings does not, in law, sanction the judgment which has been given upon it, the error sufficiently appears upon the record to

bring the case as well within the 25th section of the act of 1789, as within section 2 of the act of 1867. *Fairfax's devisee* v. *Hunter's lessee*, 7 Cranch, 622. Moreover as to all the grounds, whether in the pleadings or in bills of exceptions, this court may "look at the record of the proceedings of the inferior State court in connection with the proceedings of the highest court, in order to deduce therefrom the points decided by the latter." *Neilson* v. *Lagow &c.*, 12 How., 109, 110; *Maguire* v. *Tyler*, 8 Wallace, 664. "The title of the parties litigant must necessarily be inquired into." And although the statute of West Virginia, cited *ante* p 8, note was passed pending this case, yet "the decision of this court must conform to the state of rights of the parties at the time of its own judgment." On this and other collateral questions, *Johnson*, J. did not differ materially from his brethren in *Fairfax's devisee* v. *Hunter's lessee*, 7 Cranch, 631, 632.

The judgments in both cases should be re-examined and reversed for error in the judgment on the demurrers, and in the opinions at the trial. And on such reversal there should, on the demurrers, be final judgment for the defendant sustaining as valid some one or more of the pleas demurred to; or else there should at least be an award of a new trial for error in the opinions at the former trial.

CONWAY ROBINSON,
One of the counsel for plaintiff in error.

Supreme Court of United States.

DECEMBER TERM, 1871.

Nos. 165 and 166.

No. 165.

ALLEN T. CAPERTON
vs.
PHILIP BOWYER.

From Supreme Court of Appeals of West Virginia.

No. 166.

THE SAME
vs.
WM. A. BALLARD,
Adm'r of
WM. BALLARD.

SIMEON NASH,
Of Counsel for Plaintiff in Error.

H. Polkinhorn & Co., Printers, D st., near 7th, Washington.

Supreme Court of United States.

DECEMBER TERM, 1871.

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No. 165.

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THE SAME
vs.
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Adm'r of
WM. BALLARD.

The two cases involve nearly the same questions, and may be, therefore, discussed together.

I will state first the questions presented in the record of each case and then proceed to discuss the law applicable to each, and present the reasons why both judgments should be reversed.

In the case of Caperton v. Ballard, the pleadings present the following facts:

1. The plaintiff's declaration charges the defendant with taking and converting to his own use certain personal property of the said intestate in his lifetime, to wit, on the 28th day of January, A. D. 1863, in the county of Monroe in the then State of Virginia.

2. The amended declaration avers the time to have been on the 20th day of December, A. D. 1862.

To this declaration the defendant Caperton pleads several pleas.

1. He is not guilty. (This is marked No. 3.)

2. He sets up that he was a citizen of the State of Virginia; that Virginia raised an army to defend her territory against the enemies thereof, acting in conjunction with the so-called Confederate government, and that said war was such as to make the State and confederate forces belligerents, and they have been so recognized by the United States; that while said county of Monroe was in possession of the Confederate and State forces he was duly appointed provost marshal of said county of Monroe by said State of Virginia; that the intestate had been arrested for harboring deserters, had escaped within the enemy's lines, and that said personal property was taken under the authority of the acting government as abandoned property, and sold as such by the proper officers of the State and Confederate governments, and so far as defendant had anything to do with the same it was done by him as a duty in his said office of provost marshal. No. 4.

3. This plea denies the plaintiff is administrator of said intestate. No. 1.

4. This plea (No. 2) craves oyer of the supposed letters, and they are set forth as granted the 25th of April, A. D. 1866, by Circuit Court of Monroe county; the defendant then avers that at a court for Monroe county, at its February term, A. D. 1863, said court duly granted letters on said estate to John C. Ballard, who was duly qualified; wherefor he prays if plaintiff ought to maintain said action.

5. This plea sets up a pardon by the President of the United States, dated the 7th day of September, A. D. 1865, wherein he received the grant of a full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in said rebellion; that he had accepted said pardon and took the oath prescribed in proclamation of President of May 29, 1865.

6. Sets up a settlement and compromise with administrator of intestate on 20th July, 1863, whereby there was paid him net proceeds of sale.

PLAINTIFF'S REPLICATIONS.

1. He takes issue on plea he is not administrator.

2. He says to second special plea, that the letters granted in February, A. D. 1863, were letters granted by a court in rebellion against the Government of the United States, and were null and void, and puts himself upon the country.

3. He takes issue on plea of not guilty.

4. He demurs to the fourth plea stated secondly above.

5. Plaintiff demurs to No. 5, setting up a pardon.

6. As to plea No. 6, plaintiff says that said sum of $794.19 was not paid to the lawful administrator of said intestate, or to any other person having lawful authority to receive the same, and puts himself on the country.

I may remark that the second replication is worthless; it admits the truth of the plea, and avers a new fact that the court was a court in rebellion without setting out the existence of any civil war, and he goes to the country on this new averment without giving defendant any chance to rejoin.

The reply to the 6th plea is a demurrer; it does not deny the facts stated in the plea, but says it was not paid to the *lawful* administrator of intestate. Whether *lawful* or not is a question for the court, not for the jury. This replication, therefore, admits the facts set forth in said plea, and amounts to a demurrer if to anything.

The bills of exception exhibit the facts and the rulings of the court; they show that whatever was done was done under the Confederate and State authority, that territory being within the rebel lines and under the control of the Confederate authorities; that the goods were seized and sold under the authority of the rebel government, in a case authorized by the Confederate authorities, and that the settlement was made with an administrator appointed by the County Court of Monroe county.

The court ruled that the court being a rebel court its acts were wholly void, and the payment in confederate money void, and said defendant below was liable.

The second case, Caperton v. Bowyer, presents in the pleadings and bills of exceptions the following facts:

1. The declaration charges that on the 29th day of June, A. D. 1862, at the county of Monroe, in the State of Virginia, the defendant seized, transported, and carried plaintiff from his home in Monroe county, to Union, in said county, and imprisoned him for 24 days.

To this Caperton pleaded:

1. He demurred to the petition.

2. He plead not guilty.

3. He says that the action was not brought within one year next after the right to bring the same accrued.

4. That the action was not brought within two years after the right accrued.

5. That more than two years had elapsed after the right to sue accrued before the passage of the act of March 1, 1865, relative to the statute of limitations.

6. That at the time when the supposed grievances were committed, the plaintiff and defendant were both citizens of Virginia, and residents in the same, and the whole time of limitation, presented for this action by the law of said State had run while defendant resided in said State, and before the first day of March, A. D. 1865, when an act was passed by West Virginia, relating to the statute of limitation.

7. This plea sets up his being a citizen of Virginia, the existence of the civil war, that the rebels had been recognized by the Government of the United States as belligerents; that defendant was provost marshal of Monroe county; that plaintiff had been arrested for harboring deserters by other than defendant; that he discharged plaintiff on giving surety for good behavior, denying that he instigated the arrest and made it himself; that all he did was done in the discharge of his said office and in pursuance of the executive authority then governing the State.

8. That he had been pardoned, as stated in the other case.

The plaintiff replies as follows:

1. He joins in demurrer.

2. He joins in plea of not guilty.

3. As to first special plea, he says that his said action is not barred, as is set forth.

4. A similar reply to the second special plea, that said action is not barred.

5. A similar reply to the third special plea.

6. The plaintiff demurs to the fourth special plea as not sufficient in law.

7. He demurs to the fifth special plea.

8. He demurs to the sixth special plea.

Defendant rejoins:

The defendant demurs to replication to first special plea.

The court overrule the demurrer to declaration.

The court sustain the plaintiff's demurrer to the fourth, fifth, and sixth special pleas of the defendant.

The court overrule the demurrer of defendant to the replication of plaintiff to defendant's first special plea.

A verdict for plaintiff, $833.00. Motion for new trial overruled and judgment on the verdict.

This record shows that the seventh and eighth pleas of defendant were not replied to at all by plaintiff. They stand on the record unanswered, and therefore, admitted to be true.

The seventh sets up the belligerent rights of defendant, and the eighth the pardon of the President.

The second bill of exceptions sets out the whole evidence on which the court refuses a new trial, which need not be here repeated. It shows an acting under rebel authority, an arrest by the military, and a release by defendant on surety being given.

Such are the pleadings and facts embodied in these

records. It is apparent from them that Col. Caperton set up a claim under the laws of war, as acting under confederate authority, that he was not personally liable for the acts so done, and the court decided in sustaining a demurrer to these pleas that he could not, in law, protect himself by any such claim.

He also sets up a settlement and compromise in the Bailey case, of the cause of action there declared on with the administrator appointed in 1863, the court decided that the court was no court, and said appointment null and void; whereby John Bailey who obtained the money kept it, and obtains his share of this recovery.

Both these questions arise under the law which is to be applied to the rebellion, and the action of the State in rebellion during its existence.

There is another question presented in the Bowyer case. That course of action accrued in June, 1862, and the action was commenced May 11, 1866. The limitation was one year. Both parties lived in Monroe county, within the rebel lines, where the cause of action arose, and remained there for more than two years thereafter. On March 1, A. D. 1865, a law was passed by West Virginia, enacting that a certain time named in said act should not be reckoned in the running of the statute, and it is by virtue of this act that this action is sought to be taken out of the statutes. The State court held this act constitutional. It is to this ruling that the action of this court is invoked, under the claim that this ruling is against the fifteenth amendment.

Has this court jurisdiction of these cases? I assert that it clearly has that jurisdiction. Col. Caperton set up a claim to be exempt from liability under the *laws* of war, which exempts one engaged in war for certain acts

done in the prosecution thereof. The court below denied this right absolutely by sustaining the demurrer to the pleas setting up that defense.

Is this a right or claim set up under an authority exercised under the United States? That depends upon the fact whether international law is a law of the United States, of the *nation*, and not of the several States. International law is a law between nations, and not between fractions of nations, and hence it must be a United States law, and a law of a State only in the sense in which the Constitution and laws of Congress are laws of a State. If this is not the case, then each State in a war may make its own law on the subject, and in that way involve in inextricable confusion the foreign relations of the nation of the United States. Such was the question in the McLeod case in New York, growing out of the burning of the Caroline. The Supreme Court of that State decided that the State had jurisdiction to try and hang McLeod, notwithstanding Great Britain had recognized the act as done under her orders, and claimed that the British Government, not McLeod, was responsible for what was done. (*People* v. *McLeod*, 1 Hill, 377.) Under the ruling of that court McLeod was put on trial, but I was told by the late S. F. Vinton that a judge of this court had intimated to the President that this court had jurisdiction over the question, and the Attorney General was present at the trial with the necessary documents to put the question on record so it could be taken up, and the nation saved from a war with Great Britain, by this strange decision of a State court.

That such was the understanding of the administration and of well informed persons at the time, is clear from a notice of the trial of McLeod, in the National Intelligencer of May 22, 1841. The editors there say in

alluding to this trial: "Whatever the decision, whether for releasing or remanding the prisoner, an appeal will probably be taken to the Court of Errors, from which a further appeal lies, in cases of this nature, to the Supreme Court of the United States." Mr. Choate, in a speech delivered on the 11th of June, 1841, in the United States Senate, maintains the same position. (See National Intelligencer of June 17, 1841.) He says: "The clear course of the Government, therefore, was to do what it did, to have his (McLeod's) case fairly tried, and if needful, to have his case brought into the national tribunals." This shows that the opinion of Daniel Webster, then Secretary of State, upon the jurisdiction of this court, on a right so set up under international law, under the laws of war. (As to this see also Webster's Private Correspondence, vol. 2, p. 104; letter of May 16, 1841, to Fletcher Webster, and p. 112, letter of Jan. 14, 1842, to Mr. Berrien.)

This must be the law, or the General Government is at the mercy, on a question of foreign relations, of the action of a State, or of its courts. So in the case of the late civil war, parties for acts done in prosecution of that war are liable or not liable for acts so done, just according to the whim or prejudice of any State court. Is it possible that this court has no jurisdiction over these questions to secure that conformity which is essential to the administration of justice?

This was a *civil war* between the United States and the Confederate government; it was not like the Dorr rebellion, a rebellion against a State. In such a war, can a State give the rebels belligerent rights? Or is that a question exclusively within the jurisdiction of the United States?

In the case of the Nereide, 9 *Cranch*, 388, Marshall, C.

J., says: "Till such an act be passed, *the court is bound by the law of nations, which is a part of the law of the land.* Ib. 423. The *law of war* is part of the law of nations, and so a part of the law of the United States. Wheaton, 506; Vattell, 291. Besides the Constitution of the United States empowers Congress to declare war, *suppress insurrections*, and repel invasions, (Article 1 § 8;) not one word is said as to the mode or manner of conducting a war, suppressing a rebellion, or repelling an invasion; that is left to be settled by that code, well known to the men who made that instrument, *as the laws of war.*

This civil war was a war between the United States and an organized rebellion, and no authority but that of the United States could deal with it and give the rebels belligerent rights, and when these rights were once given by the General Government, no State or State court had power to deprive the rebels of these belligerent rights, whatever they might be. And such have been the decisions of this court.

This doctrine was asserted by the whole court in the *Prize Cases*, 2 *Black*, 635, Greer, J., says, Ib., 670:

"Whether the President, in fulfilling his duties as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the *character of belligerents*, is a question to be decided *by him*, and this court must be governed by the decisions and acts of the political department of the government to which this power was entrusted."

Nelson, J., in his dissenting opinion uses this language: "In the case of a rebellion or resistance of a portion of the people of a country, against the established government, there is no doubt, if in its progress and en-

largement the government thus sought to be overthrown, sees fit, it may, by the competent power, recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties, as in the case of a public war. * * * * * * But before this insurrection against the established government can be dealt with on the footing of a civil war, within the meaning of the law of nations and the Constitution of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the government."

It will thus be seen that the whole court agreed on the law, but disagreed on the point whether the President or Congress could exercise it. The majority of the court held that the President could make the recognition of a civil war, while the minority held that Congress alone could make the recognition of a civil war. The majority of the court held that the civil war, with all its incidents of belligerent rights, existed from the issue of the President's proclamation of the 27th and 30th of April, 1861, while the minority held it did not exist until the act of July 13, 1861.

The same doctrine is laid down in Coppell v. Hull, 7 Wallace, 542, 554. Swayne, J., says: "When the contract was entered into the rebellion had become a *civil war* of large proportions. Important belligerent rights were conceded to the insurgents by the government of the nation. The war, in many of its aspects, was conducted as if it had been a public one with a foreign enemy. (The Prize Cases, 2 Black, 687; Mrs. Alexander's cotton, 2 Wallace, 417; Mouran v. Insurance Company, 6 Wallace, 1.) * * * During the late civil war the subject was regulated by Congress."

The same doctrine is recognized in all the subsequent cases decided in this court. Mr. Justice Clifford in Levy v. Stewart, (11 Wallace, 244, 253,) distinctly affirms the position that the *civil war* began with the proclamation of the President of the 19th day of April, A. D. 1861, and the act of Congress of July, 1861, and was closed by his proclamation of August 20, 1866. This admission is made on the ground that the General Government alone had this power. All the cases decided rest on the same ground. Vide, 2 Wallace, 419, 420, 274; 3 ditto. 617, 6 ditto, 582, 521; 8 ditto, 552; 8 ditto, 163; 11 ditto, 508, 244.

The case of Stewart v. Kahn, 11 Wallace, 493, is a writ of error to a State court, and seems to settle the jurisdiction of this court in this case. The question there presented was the running of the statute of limitations during the war. It is true a statute of Congress is referred to, but the court had decided in the case of Hanger v. Abbot, 6 Wallace, 532, just what the statute declared to be the law, independent of that statute; hence statute or no statute, this court had jurisdiction to enforce the law of the United States, the rule of international law, as much without and with the statute. This case too enforces the proposition of the exclusive jurisdiction of the United States over the war, so far that it can declare that *all* statutes of limitations shall not run during the war under certain circumstances.

In this case, Col. Caperton set up an exemption from liability under this grant by the President and Congress of the rights of belligerents to the rebels, and the State court decided against him on this claim, and hence he comes within the judiciary act, and is entitled to the appeal.

In the Bailey case, he sets up the appointment of an

administrator by the court of Monroe county and a settlement and payment of this claim. The court below decided that all acts of what the judge calls a rebel court are void, and said settlement and payment a nullity. Here is a question that this court must decide, because the question is one involving the action of Congress upon the condition of the rebels and the rebel States, and to what extent their acts and doings are valid or void. One State has no power to decide the government of another State is void, and its courts nullities. This is a very important question, and one that can only be settled by this court in deciding what, under the Constitution of the United States and the laws of Congress, and the proclamations of the President, was the legal condition of the States in rebellion so far as their mere domestic affairs are concerned. The courts of West Virginia assume to annihilate the State of Virginia, for if its courts are nullities, so is its domestic government, and all acts done under the same during the war. This is surely a federal question, if there is one growing out of the war, and if to be settled, must be settled by this court, or it cannot be settled at all. If the State courts in the rebel States are nullities, it must be from the rebel States relation to the United States, and not to other States. Hence it is a question arising under the Constitution and laws of the United States and the rules of international law, as applied to the States in rebellion.

I know that Swayne, J., in Stewart v. Kahn, 11 Wallace, 493, 507, seems to insinuate that this court obtained its jurisdiction in that case by virtue only of the statute. "It only applies, he says, coercively the principle of the law of nations which ought to work the same results in the courts of all the rebellious States without the intervention of this enactment." The court had already de-

cided in Hanger v. Abbot, 6 Wallace, 532, that by international law, as neither party who lived on different sides of the line between the government and the rebels could institute a suit during the civil war, the statute could not run during its existence. This the court said was a part of the law of nations. Now this international law must be a law of the United States, or of the several States. If it is the law of the States, then Congress has no more power to control the State courts in applying it than it would have to modify any statute of a State. If, on the other hand, international law, as I claim, is a law of the United States, and as such, as binding on the State courts as the Constitution of the United States and the laws of Congress, and if a State court decides against a claim set up under this international law, then this court has jurisdiction under the judiciary act to revise this decision and either affirm or reverse it, as it considers the decision to be right or wrong, according to its views of international law. Nor can a statute of the United States, declare what international law is on a specific subject. This act, as the court say, only declares what was the law before. Now, unless the court had jurisdiction of the question before, how can the statute give it jurisdiction? Can Congress by passing a law obtain jurisdiction over the State courts of a question not given to it by the Constitution? If so, then all State legislation is at the mercy of Congress. But this court has no jurisdiction over State legislation, and judicial action, except what is expressly given it in the Constitution. The judge says "the power to pass this act is necessarily implied from the power to make war and suppress insurrections." Now the Constitution does not say one word as to the mode or manner in which a war shall be conducted, or a rebellion suppressed. This is left to be settled by that code, well known by the framers of the Constitution, *as the laws of*

war. Hence, if we seek to comprehend the mode of prosecuting war, whether *civil or foreign*, and the rights and powers of the belligerents engaged in it, we must look elsewhere than to the Constitution, which is silent on all these matters; we can look nowhere else than to international law, of which the laws of war are a part, as expoundent by publicists and courts; these are laws which govern all civilized *nations*, and cannot be altered or modified but by the consent of nations; no one belligerent nation can rightfully change one of its rules in its intercourse with another nation; such an effort would be a public wrong to all other nations and a just cause of war. It was by this construction of the Constitution that it was held we had the constitutional power to purchase Louisiana and Florida, to hold California and New Mexico by conquest, and Oregon by discovery. By the law of nations, to acquire territory by purchase, conquest, and discovery is a necessary incident to every nation. The war power granted to Congress in the Constitution necessarily carries with it all the incidents and circumstances attached to it by the law of nations.

It will then be seen that the laws of war are a part of the Constitution of the United States, and a law of the United States; because a *State law* can give Congress no additional power not in the Constitution, or incident to the powers there granted. Mr. Justice Nelson, in the Prize Cases, 2 Black, 697, alluding to a portion of the opinion of Taney, C. J., in Sutter v. Boulen, 7 How., 45, says: "But it is only necessary to say that the term *war* must necessarily have been used here by the Chief Justice in its popular sense, and not as known to the law of nations, as the State of Rhode Island confessedly possessed no power under the federal Constitution to declare war." This is a distinct indication of the opinion that the only war

known to which the law of nations can be applied is a war carried on under the Federal Constitution; and it excludes the idea that international law is the law of a State as such, but of the United States alone. The judge admits that this statute is the mere enactment of what the law was, by which all courts ought to be bound; but how can a statute of Congress, simply re-enacting this law, give to the court jurisdiction if it did not possess it before? If before the statute it was a matter of concurrent jurisdiction, then courts of each jurisdiction would be independent of the other and the State courts have as good a right to reverse the decision of the courts of the United States as these courts would have to reverse the judgments of the State courts. And how can a law of Congress change this judicial state of things? There is but one ground on which the jurisdiction can be maintained, and that is that international law is under the Constitution of the United States, an integral part of the laws of the United States, and as such are binding on the State courts; and if in the State courts one sets up a right or claim under that law and that is decided against him, then an appeal lies to this court as much and as clearly as in any other case coming under the Constitution and laws of the United States.

The McLeod case shows the necessity of such a jurisdiction. In that case if McLeod had been convicted and hung, Great Britain would have held the General Government responsible for the act, as she could know nothing of the State of New York; and thus the whole country might have been involved in a war with Great Britain for the blunder of a State court, over which the General Government had no control. This state of things should not be admitted, and it seems that the judges and lawyers, with Daniel Webster at their head, did not then

believe that this court had not jurisdiction over a question of international law, coming up for decision in a State court. The civil war will and must give origin to much litigation, involving questions of international law, and this court ought to have final jurisdiction of all such questions in order to secure uniformity of decision and protection from legislation prompted by prejudice for or against the civil war for the restoration of the Union. In West Virginia the rebellion is simply treated as a great riot, trespass, and assault and battery, where each rebel is liable for the acts of all, wherever committed, be he ever so far from the place where the cause of action originated. Every act of a rebel was illegal; every act of the Union men is declared by law justifiable. Hess v. Johnson, 3 West Virginia Reports, 645. The courts uphold all this legislation, and hence the rebels are liable to be sued for any and all acts, while no action can be maintained on the other side. There is here no mutuality; the exemption is all on one side, and the liability all on the other side. The rebels, once in the possession of the political power, may, and can, by the same mode of legislation and decision, reverse this order of things and shift the liability on to the other side. Has this court no power to revise the decisions and this legislation against rights granted the rebels by the General Government, when it regarded the rebellion as a civil war, and obtained for itself and gave to the rebels belligerent rights? I assert with Webster, and the lawyers of a prior time, that this court has this jurisdiction, and justice as well as the peace and safety of the nation require its exercise by this court.

On the question of jurisdiction of this court, I may refer to Lawrence, Wheaton, 189, 190. This case of McLeod, Mr. Lawrence says, note 66, the difficulty

did not arise from any defect in the organic law, which extends the power of the federal judiciary to such cases, but from the omission in the judiciary act of 1789, which was subsequently supplied, as above mentioned, by the act of the 29th of April, 1842, As the law at the time stood the case could have been brought to the Supreme Court of the United States, but only after a final decision of the highest court of the State, had McLeod been willing instead of going to trial on the question of fact, to have submitted to a succession of appeals. In the event of an unfavorable verdict on his trial, he might have obtained an arrest of judgment from the court on the question of international law involved; and had the courts of New York decided against him, he might have taken an appeal to the Supreme Court of the United States, *Vide, also, De la question de jurisdiction qui s'est presentée devant les cours des Etats Unis dans l'affaire de Macleod par Henri Wheaton, minister des Etats Unis a Berlin. Revere Et et Fr tome* 9, *page* 31.

This opinion maintains the jurisdiction in questions of international law, and Mr. Wheaton seems to have assumed such to be the law, 5 U. S. Statutes at Large, 537. And this statute of 1842, which I have not before me at this time, assumes the right of jurisdiction by providing for a transfer of such a case, before trial, to the United States courts. This act asserts the whole doctrine, and it would seem that such authority ought to conclude the question.

I may add one reference more as to the opinion of those who have spoken of this matter. Mr. Sheffield, (Cong. Globe, 1862, App., page 169, May 23, 1862,) says, after saying that the rebellion had become a *civil war*, and, therefore, the rights of general war were super-added to the municipal rights we have against them as rebels,

adds: "What are these rights of general war? They are fixed by the law of nations, and are a part of our Constitution, though they cannot be modified without the consent of other nations. Congress cannot alter or control them. They are beyond its reach, for they govern all civilized nations, and Congress cannot legislate but for one nation." In Mr. Sheffield's opinion, international law was a part of our Constitution, and hence a law of the nation, and not of the States as such; and hence this court has jurisdiction of all questions growing out of the application of that law.

Such too must have been the opinion of Mr. Webster n the McLeod case as well as that of the administration, and I presume his correspondence on the subject will show that the British Government had no right to complain until the case had come before the Supreme Court of the United States, and it had decided the legal liability of McLeod to punishment under the laws of New York. I so judge from Mr. Lawrence's references in the note I have cited abov.e

The record in the case of Bowyer presents another question. The answer of Caperton sets up that the cause of action did not accrue within one year before the commencement of the suit. By the law of Virginia, then in force, the limitation in a case of this character was one year, (Code of Virginia, 1860, 638, § 11.) The record shows that the validity of the act passed March 1, 1865, was brought in question on the ground that it was against the Constitution of the United States, and the decision was in favor of the validity of the law. This act of 1865 enacts, that the time between certain dates should not be counted in the running of the statute of limitations.

This statute is absolute; it makes no difference where

the parties were, whether within the rebel lines or not. The act of Congress of June 11, 1864, provides only for cases, where service could not be had by a creditor within the Union lines.

There is here no reply setting up that plaintiff was within the Union lines and could not sue. A demurrer is filed to the plea, and sustained on the ground that the act of 1865, of West Virginia, removed the effect of the bar. Hence, if that act is void, the decision was wrong.

This question comes within the fifteenth amendment which provides: "*nor shall any State deprive any person of life, liberty, or property, without due process of law,*" (Acts, 1866, 406.) This is an old clause in the State constitutions, and was intended to protect all *vested right.* If, by the law, as it was, no right of action existed in favor of one against another, no legislation could give one. Rights of action or property are to be settled by the courts, and not by an act of legislation. Besides, the power to make laws does not give the power by legislation to settle the legal right of parties. A law is a rule of action in the future, not the settling of rights growing out of the past. I may refer to an article in 2 Western Law Monthly, 170, 197. The question of retrospective law is there fully discussed and all the authorities up to that time referred to. On the justice of retrospective legislation, I may cite the Court to the case of Fletcher v. Peck, 6 Cranch., 37; Society, &c. v. Wheeler, 2 Gal., 105; Dash v. Van Kleck, 7 John., 477; Martindale v. Moore, 3 Blackford, 275. The opinion of Johnson. J., Satterlee v. Matthewson, 2 Peters' Rep., 681, Appendix, No. 1.

A vested right is defined to be the right the person has, in whom it vests to do certain acts, or to possess, occupy,

own, or enjoy certain things, or to ask, demand, recover, and receive certain things, according to the law of the land at the time. Per Stevens, J., (3 Blackford, 282,) It may be added, that a right to defend against a claim set up by another, is as much a vested right, as the right to bring an action.

Now, it is this right, this vested right, which this clause in the fifteenth amendment was inserted to protect, or it means nothing. It means, that the Courts shall, by due process of law, settle the rights of parties, not the legislature by a law. To change a man's right, as fixed by law, by a law, is not to do it by due process of law. A party has, as the law now is, a complete defence to a claim set up by another; the legislature, intervening with a new law, so changes the rights as to deprive him of that defence. If the case had been by due process of law, decided before the new act, it would be decided one way; after the act, if held valid, it would be decided the other. The party would thus be deprived of his defence; hence, of his property, not by due process of law, but by an act of legislation.

This language has received a judicial construction; and this construction is, that this language means a suit at law or in equity. In Lee v. Pembroke Iron Company, 57 Maine, 481, it was held, that by due course of law in the constitution of Maine was meant an action at law.

If this provision had been in the Constitution of the United States at the time of Satterlee v. Matthewson, 2 Peters, 414, that case would have been decided differently in my opinion. I think this clause was inserted to accomplish what Johnson, J., said so emphatically in that case, ought to be the law. What boots it, said Johnson, J., that I am protected by that constitution from having the

obligation of my contract violated, if the legislative power can *create* a contract for me, or render binding upon me a contract which was null and void in its creation? To give efficacy to a *void* contract is not, it is true, *violating* a contract, but it is doing infinitely worse; it is advancing to the very extreme of that class of arbitrary and despotic acts, which bear upon individual rights and liabilities, and against the whole of which the constitution most clearly intended to interpose a protection commensurate with the evil." This new clause has accomplished just what Judge Johnson said, was intended to be accomplished by the original Constitution. The evils of retrospective legislation had become apparent, and this clause must have been designed to throw the mantle of the Constitution of the United States over rights once vested against unjust and wicked legislation. Chief Justice Mellen in the case of Prop'rs, Ken. Purchase v. Larabee, 2 Greenleaf, 290, gives some striking examples of the iniquity of retrospective legislation and its incompatibility with rights vested under the law in force. The same remark may be made of the opinion of Stevens, J., in Martindale v. Moore, 3 Blackf., 275. I may also refer to the case of Paulet v. Clark, 9 Cranch., 292, where the Court declares, that no legislative act can divest even a town corporation of a vested right to property; that such an act is not only unconstitutional, but is contrary to the solid principles of just legislation.

This is a very salutary provision, whereby, through this Court, a uniformity of decision may be secured on this question, how far legislation can impair or change vested rights, whether in possession or in action. There has been and is a conflict among the State Courts on the question; though the great weight authority is against the constitutionality of retrospective legislation. *No*

State shall deprive any person of life, liberty, or property without due process of law. This clearly implies that the rights of parties are to be settled by the courts, and not by legislation. If it does not mean this, then it is a glittering generality, which means nothing; but the Court cannot come to that conclusion; it was intended to protect the citizen in his rights of person and property, as vested in him by law. The courts, not the legislature, were hereafter to decide upon rights. There was an evil aimed at by this provision, and it was the iniquity of that legislation that sought to change the law retrospectively, so as to take property from one and give it to another, when by the law in force, it legally belongs to the former.

Mr. Howard said in reference to this first article in the fifteenth amendment; we desired to put this question of citizenship, and the rights of citizens and freedmen under the civil rights bill, beyond the legislative power of such gentlemen as the Senator of Wisconsin, who would pull the whole system up by the roots, and destroy it, and expose the freedmen again to the oppression of their old masters, (Part 4, Cong. Globe, 1866, 289 h.)

Mr. Morrall says of this first section: "The first section of this proposed amendment to the Constitution is to strike down those State rights and invest all power in the General Government, (Part 3, Cong. Globe, 2,896 1866.)

These two extracts show clearly that the section was supposed to mean something and that something is clear to my mind; it was intended to render void all State laws, seeking to change the rights of persons already vested by the laws in force. The beneficial effects of such a provision is seen in the series of decisions by this Court, on the provision against a State, by law impairing

the obligations of contracts. This provision has been a felt necessity to stop the unjust legislation of the States to change by a law, the rights of persons to property, and depriving one of a valid defence to an action. Justice requires that the rights of parties should be enforced in courts of justice, and not ex-parte by an act of legislation.

This provision requires no congressional legislation, it is a prohibition on the legislation of a State, the same as the one against impairing the obligation of contracts. This Court must hold void any law which has the effect to deprive a person of his property except by due process of law. And due process of law requires that a party shall be properly brought into court, and when there shall have the right to set up any lawful defence to any proceeding against him.

Wright v. Cradlebaugh, 3 Nevada Rep., 341.

Jewett, J. discusses the meaning of a similar provision in the constitution of New York, in the case of Burch v. Newbury, 10 N. Y., (6 Selden,) 374, 396, 397. A party had by omission lost the right to appeal, and the legislature passed a law by which he could obtain one. In reference to such a law, Jewett J. says: "If the act is not invalid upon principles which I have endeavored to state, as I think it is, it seems to me that it is contrary to the clause in Article 1, § 6 of the constitution of this State, which provides, that *no person shall be deprived of life, liberty or property without due process of law.*"

"This act assumes to create the means by which the complainant may open the decree for a reconsideration and adjudication upon the merits in a controversy in the suit between the parties irrespective of the present decree, substantially by another court having power to alter, modify or reverse the decree and make a new decree, ad-

judging money to be paid by the defendant to the complainant. In such an event the money adjudged to, and obtained by the defendant under the existing decree, would be taken from him and returned to the complainant. * * * * It is in effect doing more than merely annulling a complete and final decree, by which property has been acquired and passed contingently, it not only deprives such person of the property thus acquired, but compels him to pay to his adversary such sum of money as the Appellate Court may determine he ought to pay.

"That the money adjudged to be paid by the decree, and received by the defendant under it, was his property in a legal sense at the time of the passing of the act cannot admit of any doubt; he owned, had a legal title and was in possession of it.

"I think the provision contained in the constitution referred to secures a person against being deprived of his property, either contingently or absolutely."

"It cannot be pretended that the words "without due process of law" used in the constitutional provision, mean a statute passed for the purpose of working the wrong. They cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms, and solemnities for determining the title to property. (Taylor v. Porter, 4 Hill, 146, 147.")

In Parsons v. Russel, 11 Mich., 113, it was held, that the provision that no person shall be deprived of life, liberty or property without due process of law, is intended to secure to the citizen the right to a trial according to the forms of law, of the questions of his liability and responsibility before his person or his property shall be condemned. Vide also Ames v. Port Huron, 11 Mich., 139, where the same doctrine is reasserted.

By the State and Federal constitutions, all judicial power is vested in the courts from whence alone process may issue to deprive a person of life, liberty or property. Hodgson v. Millward, 3 Grant, (Penn.,) 406.

The provision of the tax law, (Laws of 1858, p. 192, § 135,) making the title to land bid off by the State at a tax sale absolute and indefeasible after five years is invalid, as taking property without due process of law. Grosbeck v. Seely, 13 Mich., 329.

These decisions show the meaning attached to this language by the courts of the States, containing a clause like the present. It limits the settlement of rights to the courts, and not to the law making power.

The conflict in the decisions of the States shows the propriety and necessity of this clause, to secure uniformity all over the United States, on this class of great constitutional questions; besides the States could omit this clause, and clothe their legislatures with power to pass retrospective laws to any extent; hence the necesity for this clause restraining the States from violating this principle of universal justice, that the rights of parties shall be settled by the law in force at the time the transaction took place, out of which the right arose.

It seems that it is in the power of a State forming a new constitution, to adopt therein any provisions which are not inconsistent with the Constitution of the United States, even although previously existing grants and charters are taking away thereby. Oliver, Lee & Co's. Bank, 21 N. Y. 9.

The conflict among the decisions of the State is manifest from their reports, nearly all the courts hold that a vested right cannot be divested by legislation, but others

hold that acts that were void at the time they were done may be made valid by subsequent legislation.

Acts validating void contracts have been held constitutional in several States, Welch v. Woodsworth, 30 Conn. 149. In this case contracts void for usury were made valid. Lord v. Chadbourne, 42 Maine, 429. A law passed to remedy the defective execution powers held valid in State v. Newark, 3 Dutch, (N. Y.,) 185. A law validating a void city ordinance held constitutional in Schenley v. Commonwealth, 36 Penn. St. Rep., 29. A law, after marriage and seizure, may be passed in life time of husband to take away the wife's inchoate right to dower. Magee v. Young, 40 Miss., 164. So to make past transactions grounds for a divorce when they were not so at the time they occurred. Carson v. Carson, 40 Miss., 349. So where an illegal tax had been collected under protest, and after the tax-payer had brought suit to recover it back, an act legalizing it was passed, it was held that the act defeated the cause of action and was not unconstitutional. Grein v. Weissenberg S. District, 57 Penn. St. R., 433; Hess v. Johnson 3 W. Va., 645. The statute of 1867, curing all irregularities in previous tax levies is constituional. Muselman v. Logansport, 29 India., 533. Retrospective law not unconstitutional, when not ex post facto laws. State v. Squires, 26 Iowa, 340.

On the other hand, the decisions are numerous, holding that the rights of parties are to be decided by the law under which they accrued. Boston & Co. v. Condit., 4 Green, N. G. 394,; Stole v. Warren, 28 Md., 338; Miller v. Gibson, 63 N. C. 685; Sherwood v. Fleming, 25 Texas, 408; Wright v. Hawkins, 28 Texas, 452; Hinton v. Hinton, Phill. (N. C.) L., 410: Davis v. Menasha,

21 Wis., 491; Conway v. Cable, 37 Ill., 82: Atkinson v. Dunlap, 50 Maine, 111; Towle v. Eastern, R. R. Co., 18 N. H., 547; Koutsony v. Wolf, 35 Mo., 174; Brinton v. Severs, 12, Iowa, 389. This case seems to recognize curative statutes, but not so as to affect vested rights. Coflin v. Rich, 45 Maine, 507; New Oreans v. Pautz, 14 La. An., 853. A void procedure cannot be made valid by a subsequent law. McDaniel v. Correl, 19 Ill., 226; Gordon v. Ingraham, 1 Grant's cases, (Penn.) 152; Monach v. Finley, 10 O. R., 384, 391; Good's Lessee v. Zercker, 12 O. R., 364; McCoy v. Grandy, 3 O. St. Rep., 463, 4 Do., 354; Janney v. Gray, 5 Do., 45, 48, 39 N. Y., 171, 2 N. Y., 182; Gantley v. Ewing, 3 How. U. S., 707; Falconer v. Campbell, 2 McLean, 195; Clark v. Clark, 10 N. H., 380; McCarty v. Hoffman, 23 Penn. St., 507; Tucker v. Burns, 2 Swan, (Tenn.) 35. Hunt v. Hunt, 37, Maine, 333; Norris v. Beyell, 3 Kernan, 273; Houston v. Bogle, 10 Iredell, 496; Garnett v. Stockton, 7 Humph., 84; Bruce v. Schuyler, 4 Gilman, 221.

This legislation is unjust, which seeks to change the vested rights of parties, or in any way to modify or change them. If it can be done, then parties hold their rights depended on the will of the legislature, not upon the decisions of the court. Such legislation is admitted to be unjust, and is sought to clinch a case that has no merits. The civil law writers assert the injustice of retroactive legislation, and such is the opinion of all writers upon legislation. By this new amendment this Court is clothed with the same conservative power over retroactive legislation that it has always had over laws impairing the obligation of contracts. Local passions or prejudices will lead to unjust legislation, as it has done in regard to contracts, and the conservative influence of the prohibition against impairing the obliga-

tion of contracts, demonstrate the utility and necessity of this provision, which, rightly construed, cuts up by the roots all legislation seeking to impair, or modify, or change the rights of parties as vested in them by law. The courts which enforce the law cannot, hereafter, be interfered with in declaring the law; and this Court, sitting beyond local influences and passions, will hold in check the State courts, ever inclined to sustain State legislation, whenever they depart from the straight line of judicial duty.

I cannot doubt then but the Court must give the construction claimed to this clause, and will carry it out in the same impartial, inflexible, and conservative manner in which it has enforced the clause against the impairing of the obligation of contracts.

Having disposed of the questions of jurisdiction, I will now turn to those presented for the consideration of the court assuming jurisdiction to be admitted.

The first question raised by the record is the one raised by the demurrer to the plea, setting up belligerent rights in Colonel Caperton, as an exemption from liability. This is not a question on the facts; by sustaining the demurrer to the plea, *the State court denied that the rebels had any belligerent rights whatever.* This is in flat contradiction with the decisions of this Court from the prize cases onward. Belligerent rights must be mutual; the one party cannot possess them without the other does. It is by the admission of these belligerent rights in both parties that the blockade became legal, and all our legislation for the pacification and reconstruction of the rebel States became constitutional. Congress can legislate over these States, after conquest, as over any other conquered territory. On this point, I may be per-

mitted to refer to an article written by myself in 1864, and published in the August number A. D. 1864, of the Monthly Law Reporter, of Boston. (26 M. Law Reporter, 537.) I there endeavored to exhibit the law relating to the States in rebellion, before and after conquest, with a reference to all the authorities. It will be seen I am now advocating no new doctrine to suit a case, but seeking for the enforcement of principles formed during the late civil war, with no case in view. I urge the Court to examine that article, as it will save me from here repeatiug what is there said; for I believe principles are there established on the authority of publicists and the decisions of this Court, which control the decision of these cases. I present that article as a part of my argument in these cases.

In the prize cases, the late war was decided to be a civil war, to which are attached, by writers upon international law, and by the decisions of this Court, belligerent rights, and *hostilities may be prosecuted*, says Grier, J., (2 Black, 637) on the same footing as *if those opposing the government were foreign enemies invading the land.* Vattell, 427, § 295, says *that the war between the two parties stands on the same ground, in every respect, as a public war between two different nations.* Wheaton, 520, § 7. *But the general usage of nations regards such a war (a civil war) as entitling* BOTH *the contending parties to all the rights of war against each other, and as respects neutral nations.* These authorities, recognized and repeatedly adopted by this Court, are conclusive on this point.

The county of Monroe was in the rebel occupation, and the courts were held open and conducted under the government of the State of Virginia, in the interest of the rebellion. As a question of fact, this territory was then rebel territory and under its control, and not under

the control of the United States. This fact the Court will take notice of, if the pleadings did not admit it.

Now Grier, J. says, and he only asserts what all writers on national law lay down, that this territory was as if overrun *by a foreign enemy.* Whatever, therefore, an officer of a foreign enemy could do on our territory, and be protected from private suits, this plaintiff could do under the rebel authority of Virginia and the confederate States. Can one doubt that if Colonel Caperton had been acting as a British officer, whose army was in occupation of Monroe County, the plea would have been a full and complete answer to both of these questions? That such is the law, this Court has decided substantially in numerous cases. The law, on this question, is asserted by England and admitted by our government in the official correspondence on the McLeod case, nor can any doubt be thrown upon its correctness. This question is ably discussed by Nelson, J. in a late case in Tennessee. (Smith v. Brazelton, 1 Heiskell, 44, S. C., 2 Amer. Reps., 678.) In this case it was held that the cutting of timber, on the land of an individual, by the rebel soldiers, was by virtue of belligerent rights, and the owner could not recover for it. The opinion is an elaborate examination of all the authorities and of the decisions of this Court, and the conclusion come to cannot be successfully impugned. The same doctrine is asserted in The Santissimo Trinidad and the St. Andre, 7 Wheat., 283; 5 Pet. C. R. 284. In the case of Price v. Paynter, (1 Bush Ky.) 327, it was held that the capture of horses for the public use of the confederate army, under military authority, express or implied, however wrongful in fact, was excusable as a lawful exercise of belligerent right. Bell v. Louisville and Nashville R. R. Co., 1 Bush., 404. There are some other cases in Kentucky to the same effect, but I have

not the reports before me now, and cannot refer to them. Vide, also Sheify v. Argenbright, 1 Heiskell. 128, S. C., 2 Am. Reps., 690; Burroughs v. Peyton, 16 Grattan, 470. On the question that belligerent rights had been granted the rebels, I may cite the opinion of Swayne, J. in Cappell v. Hall, 7 Wallace, 542, 554, where he says: "Important belligerent rights were conceded to the insurgents by the government of the nation. The war, in many of its aspects, was conducted as if it had been a public one with a foreign enemy." Prize cases, 2 Black., 687; Mrs. Alexander's cotton, 2 Wallace, 417; Mousan v. Ins. Co., 6 Wallace, 1. The Venice, 2 Wallace, 258, 274.

What then is the law as to the liability of one acting under the orders of his government? It is a sufficient answer to a suit brought against a foreign functionary for seizing a vessel as such functionary, that it was done by virtue of the powers vested in him by his government. Opinions of Attorney General, June, 1794, vol. 1, p. 46. Callot's case. And, in a subsequent case, the Attorney General gave it as his opinion that "it is as well settled in the United States as in great Britain, that a person, acting under a commission from the sovereign of a foreign nation, is not amenable for what he does, in pursuance of his commission, to any judicial tribunal in the United States. Ib. December, 1797, vol. 1, p. 81. Lawrence's Wheaton, 199. But it needs no authority to show that if Colonel Caperton had been acting under British authority, while her armies occupied, as the rebels did, Monroe County, he could not have been sued in the courts of West Virginia for this act; and hence, if this war is to be conducted as though a foreign enemy had overrun this territory, no man can be held amenable to the courts of West Virginia for doing this act under the authority of the State of Virginia and the Confederate

States. The law which exempts the one exempts the other. I say, then, that when the State court, by sustaining a demurrer, denied all benefit of the law of nations, it committed an error, for which this Court must reverse both these cases.

The next question presented, is in the case of Caperton v. Ballard's Adm'r, grows out of the plea setting up the appointment of an administrator, and a settlement and satisfaction of this demand for damages. The Court decided, that the Court appointing such administrator was no Court, the appointment a nullity, and the settlement and payment also a nullity. The question here presented regards the validity of judicial acts done within the States in rebellion during the war; were these acts and doings void, or were they valid under certain conditions?

In the article already alluded to, 26, The Monthly Law Reporter, 553, the law is stated in these words, and I see no reason to change them: "The first effect of the conquest of a rebel State, is that all its laws in conflict with the Constitution and laws of the United States become inoperative and void; they are repealed by the act of such occupation; it needs no act or legislation on the part of the President or Congress to put an end to all such laws, while all other laws, such as come strictly within the jurisdiction of State legislation, will continue in force until modified or repealed by the new government or Congress. There can be no difficulty in discriminating between these two classes of laws. All laws which a State could not constitutionally enact while acting under the Constitution of the United States, will come within the class of laws which do not continue in force; while all others laws, such as pertain strictly to State legislation, will continue in force until modified by the new government." The new governments here

spoken of, are such governments as the military power, the President or Congress may establish in the rebel States when conquered.

The effect of this statement of the law is to make legal the administration of justice in a rebel State so long as it is confined to parties living within the rebel State, and recognizing its government, as in fact, the government in force. It would be a strange state of the law, if all the State laws relating to domestic and State affairs, and all the judicial proceedings between parties subject to and recognizing this *de facto* government were to be held null and void. Such a result would work an endless amount of mischief and confusion and serve no good purpose whatever. Are all of these letters of administration void; all these settlements null; and all these judicial proceedings void? I say that such is not the law; and there is no one principle of justice or of policy to uphold it.

It is said that a State cannot secede; that it has no right to secede, and, therefore, cannot get out of the Union. This is to confound *right* and *fact*. But right and fact do not always agree. It is not right to commit murder, and yet the *fact* is, that murder is committed; it is not *right* for a State to secede and rebel, and yet we know, that such was the *fact*. These States did rebel as States, says Grier, J., in the Prize cases. The *fact* we know to be so—the legislatures of the several States dissolved their relation with the Federal Government, and formed new connections with the so-called Confederate States, and they carried this legislation *into fact* by excluding forcibly from their territory the jurisdiction and power of the Federal Government. In all this, the people of the State acted in their *social* and *corporate* capacity, acted as States, and not as individuals. The machinery of the

State governments continued to act just as before, and under the laws in force before this secession. The *fact*, then, is beyond dispute, whatever may be the theory and the right, that these *States* did throw off their allegiance to the Federal Government, and formed new political relations inconsistent with their obligations to the federal authority. As States they carried on the war, and as States they kept in operation the powers of a State government. "Every man, says Kent, 1 Com., 55, is, in my judgment of law, a party to the acts of his own government. Government is the representive of the will of all the people and acts for the whole society. This is the theory in all governments." Vattell, 321, § 70, Now is it possible that these people who lived under this government and recognized it at least as the *actual* government of the State, can now be permitted to turn round and sue each other on the theory, that all this is null and void? What confusion and mischief would any such doctrine produce.

Let us keep in mind what this Court has laid down as the law: that this territory in occupation of the rebels was as though over run by a *foreign* enemy. What then would be the law in case a foreign enemy had over run this territory? This question has been settled by this Court, in Fleming v. Page, 9 How., 603, Taney, C. J., held this language: "It is true, says Taney, C. J., that when Tampico had been captured and the State of Tamiculipsas subjugated, other nations were bound to regard the country, while our possession continued, as the *territory* of the United States, and to respect it as such. For, by the laws and usages of nations, *conquest is a valid title*, while the victor maintains the exclusive possession of the conquered country. The citizens of no other, therefore, had a right to enter it without the permission

of the American authorities; nor to hold intercourse with its inhabitants; nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries." In Leitensdoefer v. Webb, 20 How., 176, Mr. Justice Daniel, says: "This is the principle of the law of nations, as expounded by the highest authorities. In the case of the Farnee, 5 Robinson, 105, Sir William Scott declares it to be the settled principle of the law of nations, that the inhabitants of a conquered territory change their allegiance and their relation to their former sovereign is dissolved." The same doctrine is laid down by this Court in the case of the United States v. Perchiman, 7 Peters, 85; Vide also Mitchell v. United States, 9 Peters, 714; 1 Kent Com., 171. It is on this ground that no one can be guilty of treason in rendering obedience to the *King de facto*, 4 Black Com., 77; 4 Comyn's Dig., 736. The allegiance for the time being is changed from the rightful to the conquering authority.

This Court has settled as to what power a conquering power may exercise in Cross v. Harrison, 16 How., 164, and in that of Leitensdorfer v. Webb, 20 How., 176. In the first case, the Court held that the military government set up by the commander of our forces was a legal government, and all its acts valid. In the second case, the acts of Gen'l Kearney in setting up a government in New Mexico, establishing courts and enacting a code of laws, was held legal and continued in force until Congress established a territorial government. The conquerer then of our territory may establish a government and courts within it, and it will be legal so long as the conquerer remains in possession of it.

But what will be the result if the conquerer is driven

out or leaves, will what he has done be valid or invalid? This question too has been settled by this Court in the case of the United States v. Rice, 4 Wheaton, 246. This case grew out of the occupation of Castine, in Maine, by the British forces during the war of 1812. Goods had been imported into Castine during the British occupation, and were found there on its re-occupation by the United States. The action was brought to compel the owner and importer to pay duties under the laws of the United States, on these goods so imported into Castine; the Court say: "that by the conquest and military occupation of a portion of the Territory of the United States by a public enemy, that portion is to be deemed a *foreign* country, so far as respects our revenue laws; that goods imported into it are not imported into the United States, and are subject only to such duties as the conquerer may impose; nor could the United States, after obtaining possession again of the territory, levy a duty on goods imported while said territory was in the occupation of a foreign enemy." This case settle, that when a foreign enemy conquers and occupies any part of our territory, that territory ceases *de facto* to be a part of the United States, and that, from that territory the authority of the United States is not only excluded, but that our laws cease to be binding on the people residing within it. The authority of the conquerer is then paramount and only such laws are in force there, as the conquerer tolerates or enacts. For mere domestic affairs, the laws in force at the conquest continue in force until changed by the conquerer. This case settles too, that the acts, doings and laws of the conquerer do not become illegal on the territory being reconquered or restored to the original owner. But we have seen that the territory conquered and occupied by the rebels is to be regarded as though conquered and occupied by a foreign enemy. These de-

cisions show that the government acts of the conquerer are valid on a restoration of the territory to the rightful owner; hence the acts and doings of the rebel States, while in possesssion of the authority of the so-called Confederate States, or in possession of the rebel State government, are valid so far as those are concerned, who lived under and recognized this *de facto* rebel rule as the actual government of a State; nor do these acts and doings become void by the suppression of the rebellion, and the re-occupation thereof by the authority of the United States.

On these authorities I assert, that this was a legal court so far as these parties living there are concerned; that the appointment of an administrator was a valid appointment, and the settlement and compromise set up, followed by such satisfaction as the administrator, willingly accepted, is a valid and binding compromise and satisfaction on this plaintiff, if he can be called a rightfnl administrator, when there is nothing in the record showing that the first administrator ever resigned. A second appointment while the first was in full force would be corum non judice and void.

This doctrine has been asserted in the case of Cassell v. Backrack, 42 Miss.. 56 S. C., 2 American Rep., 590. It is here held that the Confederate States government was a *de facto* government so far as relates to its own citizens and adherents, and all consummated transactions under it between such citizens not in conflict with the Constitution and laws of the United States, will not be disturbed by the courts. "To hold differently," says the judge, "would overturn without particularizing almost every transaction whether of a public or private nature, which transpires during the supremacy of the

confederacy, and would lead to consequences productive of incalculable mischief." Vide, also Holt v. Norton 42 Miss., 711, S. C. 2 Am. Reps., 640. So a trust deed contained a power to sell real estate in payment of a note made in 1863, in consideration of "confederate treasury notes," and renewed in 1865, was held valid, and neither note nor mortgage void. Shelby v. Augenbright, 1 Heiskill, 128, S. C. 2 Am. Reps., 690. This case maintains the position that a contract between private persons, in relation to their private matters, is not rendered void because the consideration was confederate treasury notes. There is a most elaborate opinion by Gray, J. in Kershaw v. Kelsey, 100 Mass., 561 S. C. 1 Am. Reps., 142, upon the validity of contracts made in the rebel States between persons living there. It was there held that a case between persons there for the leasing of real estate therein, the payment of rent there out of the products of the land, and the delivery of and payment for personal property already on the demised premises to be used thereon were neither void.

The case of Hickman v. Jones, 9 Wallace 197, does not conflict with the position here asserted. The court there spoken of was not a State Court acting within its domestic jurisdiction between citizens in their private matters. The court say the Confederate States government was never recognized, and its courts erected in opposition to the United States were nullities and its proceedings void. That was the case too of a man indicted maliciously in this Confederate court for high treason to the Confederate government; a crime that could not be committed. In this case the court was a State Court acting under laws passed before the rebellion and both parties were there recognizing this court as a legal court and transacting their private matters through its agency.

The next question is presented in the case of Caperton

v. Bowyer. The Court, in that case, held that a cause of action, barred by the running of the statutes of limitations, could be revived by a subsequent act of legislation. I have already discussed somewhat the unjust character of such legislation. I may, however, be permitted to refer, for a full discussion of the matter, to an article of my own, written some years since, on the constitutionality of retrospective legislation. The Court will there find the principle stated on which I claim such legislation is unconstitutional, and all the authorities up to that time examined. 2 Western Law Journal, 170, 197. There is a class of statutes about which the courts differ, called *curative statutes*, and of which the cases of Good v. Zercher, 12 Ohio Reps., 364, and Chesnut v. Shane, 16 Ohio Reps., 599, are a good example. In these cases, the legislature undertakes to change the legal effect of a contract already made, under the pretence of supplying omissions in the form of the contract. A married woman makes a deed, but the officer, in taking the acknowledgement, fails in complying with the statutes, so that at law and in equity it is a void deed and contract. Now the legislature steps in and declares that such a paper, so executed shall convey title. So, in the case of a defective deed, made by one able to contract, the law gives a definite and well-defined character to such a deed; *it is a contract to convey.* Now the legislature again steps in and declares that such a defective deed shall convey the title. Such an act changes a contract *to convey* into *a deed of conveyance*, and thereby varies the rights of the parties from what they were under a contract to convey to what they are under an absolute deed of conveyance. Such legislation assumes that the defective deed was all fair, that the law had been in fact complied with. Now, that is a fact for a court to find, and not for the legislature to assume. In

the case of a married women, it converts a *void* deed into a valid one. That is not even the business of a court, much less of the legislation. Is it possible that such legislation is not a violation of this prohibition, that no State shall deprive any person of his property except by due process of law?

But the question here presented is this: does the taking away the defence of the statute of limitations after it has once attached, deprive one of his property? It most certainly does, indirectly, by enabling one to obtain a judgment, when, without such retrospective legislation, he could not, and thus, by levy and sale, deprive him of his property. The able opinion of Jewett J., already referred to, show that it is a depriving one of property contrary to the spirit of clause. A party has a defence in the statute of frauds to an agreement; can the legislature, by a retrospective law, deprive him of that defence? It would be strange if it could. The statute of limitations is a statute of repose; a defence on which a party has a right to rely and act upon. Can the legislature, by an act or law afterwards passed, deprive him of this defence? If so, no one is safe in his estate, nor are his heirs after him; for no one can predict what a legislative body may, *on ex parte* represensation, do. In some of the States, the obligation is *extinguished* by the running of the statute. Hill v. Henry, 17 O. R., 9. Such is now the general opinion upon the effect of the statute. And is it possible that the legislature of a State has the constitutional power, by a repeal of its statutes of limitations, or by an act declaring that a certain space of time should not be included in the running of the statute, to revive all claims and causes of action heretofore barred, no matter how long since? God forbid; for if so, whose estate is safe? Mr. Justice Story, in Society v.

Wheeler, 2 Gal., 105, in his opinion, says: "Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respects to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities." He cites Calder v. Bull, 3 Dall., 336, and Dash v. Van Kleek, 7 Johns., 477, and then adds: "The reasoning in these authorities, as to the nature, effect, and injustice in general of retrospective laws, is exceedingly able and cogent, and in a fit case, *depending on elementary principles*, should be disposed to go a great way with the learned argument of Chief Justice Kent." The same opinion is expressed and asserted in Props. Ken. Purchase v. Larobee, 2 Greenleaf, 275, in the very able opinion of Mellen, C. J., and in the case of Martindale v. Moore, 3 Blackf., 275, in the opinion of Stevens, J.

Under our constitutions, whether of the United States or of the individual States, the powers of government are divided into three departments, executive, legislative, and judicial, and neither can assume the exercise of powers belonging to the others. The legislative power includes *the power to make laws*, and only that. A law is *a rule of action*, and necessarily *prospective* in its operation. To settle the rights of parties, as vested in them by law, is a matter of judicial jurisdiction, and hence, the law-making power has no control over the decision of the rights. Our legislative bodies have not the powers of the English parliament. That body had originally all the powers of government, and it transferred to courts, created by itself, certain judicial powers; hence, parliament has judicial as well as legislative power, and, with the King, is omnipotent. But Parliament

never interferes with vested rights without a regular trial before a committee, and after hearing all parties in interest. In this country, these laws are passed *ex parte*, and in the absence of parties interested against the legislation. The Constitution of the United States, Article 1, § 1, is as follows: "*All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*" § 8 declares what laws congress may pass, and on what subjects. Article 2, § 1. *The executive power shall be vested in a President of the United States of America.* Article 3, § 1. *The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time ordain and establish.* It will thus be seen that the powers of government are distinctly divided among the three branches of the government; the *law* making powers to one, the *executive* to another, and the *judicial* to a third; and the extent of these several powers were then well known, and these departments insisted on by writers on public law to avoid the injustice of confiding to the same power the right to enact law, and settle rights under them. All writers upon this subject argued against the iniquity and injustice of retrospective legislation, whereby the law-making power sought to affect the rights of parties as vested by law.

Congress, therefore, has only the power to *make law*, and to make laws *only on certain subjects.* How, then, can Congress pass a law changing the rights of parties as fixed by law? Where in the Constitution is any such power given? Can Congress, by a retrospective law, compel one to pay duties upon goods imported when the goods were not, by law, liable to duties when imported? I may, therefore be permitted to doubt the soundness of the remark of Swayne, J. in Stewart v.

Kahn, 11 Wallace, 504: "That there is no prohibition in the Constitution against retrospective legislation of this character." There needs no prohibition; Congress is a body of limited powers, having only such as are expressly granted to it. Hence, it must be shown that the power exercised is granted before it can be upheld. To interpolate any such power into the Constitution would be to justify injustice, and do what every publicist asserts is unjust. The power given to Congress is to *pass laws* on certain matters, and a law is a rule of action in the future, not a rule of action for the decision of the past. Such a law is a rule of decision, a rule for the decision of a case existing in contemplation of law between certain parties. To make such a law is to assume judicial power, the power to settle a controversy existing between parties, by laying down a *new rule*, by which that controversy is to be adjudicated. Where in the Constitution is any such power as that granted?

The case of Steward v. Kahn was correctly decided, but in my humble opinion a *wrong reason* was given to justify it. In Hangar v. Abbot, this Court had decided that by *international law* the statute of limitations did not run during the war, when the parties were on different sides of the lines of the civil war. This ruling was one which bound all State courts, because *international law* is the law of the *United States;* and hence, when a State Court refuses to follow this decision, it decides against a claim set up under the Constitution and Laws of the United States, and this Court has jurisdiction to examine and reverse it. But has Congress power to legislate on international law? Has Congress power to deprive those engaged in the rebellion of whatever belligerent rights under that law was granted them? I agree with Mr. Sheffield as quoted above, that Congress even as against rebels has no power to change the law of nations.

The rights and liabilities of those engaged in the rebellion to the general government are to be settled by the *laws of war*, and not by a *statute of Congress*, international law controls State laws, and no act of Congress could make it any more effective over State laws than it was independent of such acts.

This question of the revivor of rights of action has been repeatedly before the courts. In Slipp v. Brown, 2 Carter, India. 647, the Supreme Court of Indiana decided that the repeal of the statute of limitations did not revive an action already barred and that the legislature could not revive the action, if it had so expressly declared. The opinion is a very able one and its reasoning is to my mind unanswerable. The same question was decided and in the same way in the case of Girdner v. Stevens, 1 Heiskill, 280, S. C., 2 Am. Rep., 700. It was here held that after a cause of action had become barred by the statutes of limitations, a defendant has a *vested right* to rely upon that statute as a defense, and neither a constitutional convention, nor the legislature has power to divest the right and revive the cause of action.

Shields, J. A statute retrospective in its character and operation directly affecting and divesting vested rights is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void, 1 Kent 433, citing, Osborne v. Huyer, 1 Bay, 179; Ogden v. Blackledge, 2 Cranch, 272; Bedford v. Shilling, 4 Serg & Rawle, 401; Society v. Wheeler, 2 Gall., 105; Colony v. Dublin, 32 N. H., 432; Torry v. Corliss, 33 Maine, 333, and numerous other authorities."

"The power to pass such laws has been almost universally denied to exist in this country, under our written constitutions interpreted according to their spirit and true meaning, and such is also the sentiment and opinion of

the philosophical and text writers of other countries. Puffendorf says: "A law can be repealed by the lawgiver, but the rights which have been acquired under it while it was in force do not thereby cease. The same doctrine is to be found in Bracton, (said Bacon in Bacon Abr. was a maxim of the civil war.")

"We hold both on authority and principle, when a cause of action is barred by a statute of limitation in force at the time the right to sue arose, and until the limitation expired, that the right to rely upon the statute as a defense is a *vested* right that cannot be disturbed by subsequent legislation." Girdner v. Stevens, 2 Am. Rep., 704.

Judge Cooley in his work on constitutional law, p. 369, says: "As to the circumstances under which a man may be said to have a *vested* right to a defense, it is somewhat difficult to lay down a comprehensive rule. He who has satisfied a demand cannot have it revived against him, and he, who has become released from a demand by the operation of the statute of limitations is equally protected. In both, the right is gone, and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation." And Shields, J. *supra* says, "there can be no difference in principle whether it is a right to recover land or personal property *in specie*, or damages for the breach of a contract or for a *tort*." 2 Am. Reps., 705.

"It seems to be the general opinion," says Judge Story, 2 Com. on Con., § 1399, "fortified by a strong current of judicial opinion, that since the American revolution no State government can be presumed to possess the transcendental sovereignty to take away vested rights of property. Sedgwick on Statutes, 177. The

same doctrine has been recognized in the following cases among others. Paschal v. Perez, 7 Texas, 348; Johnson v. Band, 1 Hemph., 533; State v. Swope, 7 India, 91; State v. Clark, Ib. 468; Southard v. Central R. R. Co., 2 Dutch, (N. G.) 13; Morgan v. Reed, 2 Head. (Tenn.) 276; Sprecker v. Wakely, 11 Wis., 432; Hill v. Riche, Ib. 442; Knox v. Cleaveland, 13 Wis., 245; McCarthy v. White, 21 Calf., 490; Baldro v. Tolmie, 1 Oregon, 176; Price v. Hopkins, 13 Mich., 318; Cook v. Kendall, 13 Minn., 324. The same rule applies to an existing cause of action. A statute of limitation is void if it cut off the right at once; a reasonable time must be given to commence suit on existing causes of action before the same can be barred. Lockhart v. Yieser, 2 Bush, (Ky.) 231; Cook v. Kendall, 13 Minn., 324. The legislature cannot divest a title once perfected under the statute of limitatations, by a repeal of the statute or otherwise. Knox v. Cleveland, 13 Wis., 245; Fisk v. Briggs, 6 Rhode Isl., 557. If the time limited by statute for commencing a suit expires while the statute is in force and before the suit is brought, the right to bring the suit is barred, and no subsequent statute can renew that right. Slipp v. Brown, 2 Carter, (India.) 647.

These authorities, it would seem, are sufficient to show that a right of defense, under the statute of limitations, is a *vested* right, and one which no statute can remove. Unless such is the law, then a State has the power, by a repeal of its statute of limitations, to revive all actions barred, and even to remove the presumption after the lapse of twenty years. If such is the law, then men hold their property at the whim of the legislature, and causes of actions may be galvanized into life twenty or forty years after the bar of the statute or the presump- of payment has run. Regarding the statute as one of

repose, it would be monstrous to allow causes of action to be revived after once having been barred by the running of the statute. The great weight of authority is against any such power in the legislature. It would apply to statutes of usury, the statute of frauds, the statute of deeds, and in other cases; if, in the one case, you can retrospectively change the rights of parties, so you can in the other; and men's rights, as fixed by law, would depend upon the caprice of the legislature or the power of lobbying. This cannot be the law in a commercial and civilized State. No one would know where he stood, if he cannot rely on the law fixing his rights and liabilities at the time the transaction takes place. A vested right in defense of an action is as important as a vested right to proseeute an action. To take it away in the former case will work as much wrong and evil as to take it away in the latter case.

In this case, both parties were within the rebel lines, when the Courts were open; at least there is no replication setting up the fact that an action could not be brought; the whole reliance is on the statute of West Virginia, seeking retrospectively to take away the defence of the statute, when it had already been perfected by lapse of time. The decision in Hanger v. Abbot, 6 Wallace, 582, meets all the cases, which, in equity, are entitled to any relief; but this statute of West Virginia stops or sets aside the bar of the statute in favor of parties living within rebel lines and in a condition to bring suit at any time. International law provides for no such cases as this, and hence it is sought by state legislation to change international law, by suspending the running of the statutes, when both parties are within the rebel jurisdiction. It does this in favor of one rebel against another, though both parties recognized the rebel govern-

ment as the rightful government. In this case one of the sons of Ballard took out letters of administration in the Court of Monroe County, and acted under its authority, settled this case, received the money for which the goods were sold; he now retains it or used it at the time; and now another son takes out letters in the same court, and brings suit to recover for the estate a second time the value of this personal property, and in that way the estate recovers a double compensation for the same trespass. This, to say the least of it, is the rankest injustice, and ought not to be sustained by this court, which, blind holds the scales of justice even, meeting out to all parties, justice according to law, to rebels and union men alike. Injustice never works ought but evil, whether to individuals or to nations.

I claim that such a law, as this law of West Virginia is, comes within both the spirit and letter of the fifteenth amendment, which declares that no State shall deprive any person of life, liberty, or property except by due process of law. If this is not the construction to be given to it, then I can see no meaning in it. *Rights, vested by law* in persons, clearly ought to be protected; but the history of legislation in the States, and the decisions of the State courts, show that they are not always so protected. This clause clearly clothes this court with the power to examine and decide upon this iniquitous species of legislation, and thus secure that uniformity in this respect, which is absolutely necessary to a great commercial people separated into States. What, it is admitted by every one, it is wrong to do, no State ought to be permitted to do. To impair the obligation of a contract is no worse, is a no greater wrong than to deprive an individual of his rights of property vested in him by law. If states wish to provide for the cases, where contracts or transaction fail for a failure of an

officer in making up an acknowledgment of a deed of a married woman, or in the making up records of public or judicial sales, let them pass a law impowering courts to examine the case as an action, and, if they find that in fact all was done the law required and was fair and honest, to correct the omission and enforce the act as valid. The parties will then know their rights and legislation, justice and right be secured, and no vested right of one person divested for the benefit of another. I recollect a case in Ohio, where a court in Vrginia, on application of an administrator or guardian, had authorized a sale of land in Ohio; the Ohio court held the sale void. An application was made to the legislature, and a law was passed declaring such a sale to be valid; but the court held the law to be void. These acts are numerous where rights are are thus recklessly interfered with, and the calm unimpassioned action and supervision of this court are called for to protect the rights of *non-residents*, especially against the influence, which is brought to bear on the legislature and court of a State in favor of its own citizen. So, too, in this conflict of parties in the late rebel States, the consideration of this court is requisite to secure justice to all against this kind of retrospective legislation. This court will not surely allow, by a *narrow* construction, this important clause, inserted to protect *personal rights* of life, liberty, and property to become a dead letter. I must construe it as it reads, as a prohibition against all retrospective laws, seeking to change the rights and liabilities of persons as once fixed by law. With this construction, this law of West Virginia is clearly rendered void as against the constitution of the United States as contained in this amendment.

I have thus endeavored to present the questions involved in these cases; questions of the deepest import-

ance to the peace of the nation and the action of the general government itself, in its intercourse with other nations and its dealings with a civil war. It will be seen by an examination of the two articles I have referred to, that the opinions here expressed are not adopted for this case, but were made and adopted as correct long before these cases originated. They are solemn convictions adopted after long study, and I have here presented them as in my deliberate judgment the law as it is, and ought to be. I may also refer to an article in 2, The Western Law Monthly 175, on the question, by what law property transferred from one State or government to another State or government, to show that there subjects are not new to my mind. I now submit what is here laid down as law with a firm conviction that it is correct, and will be recognized by this court.

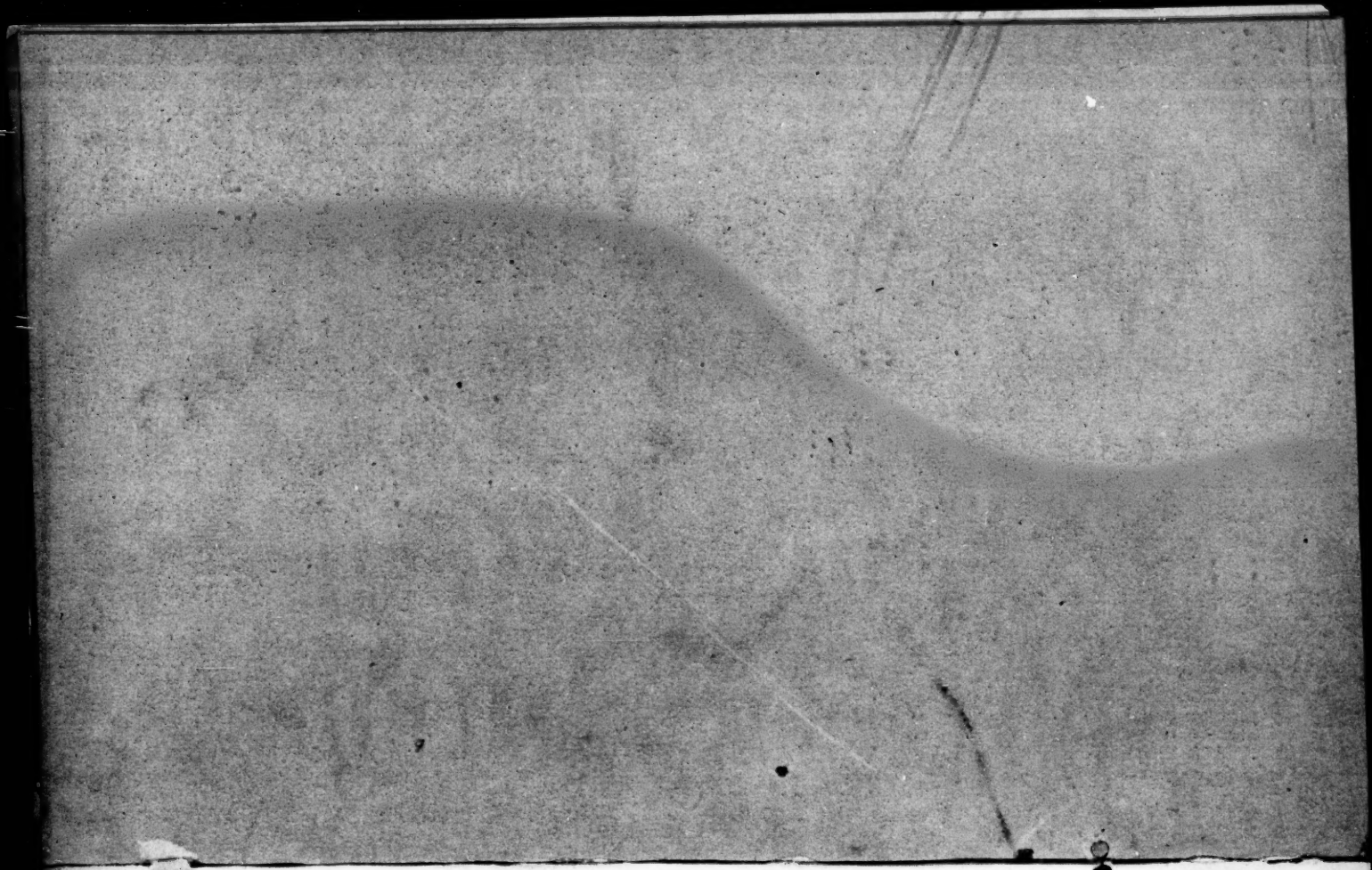
SIMEON NASH,

One of the Counsel for Plaintiff in error.

February, 1872.

with

Con R Benson



SUPREME COURT OF THE UNITED STATES.

December Term. A. D. 1871.

ALLEN T. CAPERTON, Plaintiff in Error,

vs.

PHILIP BOWYER, Defendant in Error.

ALLEN T. CAPERTON, Plaintiff in Error,

vs.

WM. A. BALLARD, Adm. of WM. BALLARD, Dec'd, Def't in Error.

In Error to the Court of Appeals of West Virginia.

ARGUMENT FOR DEFENDANTS IN ERROR.

B. STANTON, ATTORNEY FOR DEFENDANTS.

Supreme Court of the United States.

December Term, A. D. 1871.

ALLEN T. CAPERTON, Plaintiff in Error.

vs.

PHILIP BOWYER, Defendant in Error.

In Error to the Court of Appeals of West Virginia.

ARGUMENT FOR DEFENDANT.

There is only one question in this case over which this Court has jurisdiction, and that is, whether the State Court erred in holding that the President's pardon for "all offences by him committed, arising "from participation, direct or implied, in the rebellion," was not a defence to a civil action for trespass and false imprisonment.

If it was an indictment for treason or felony, for any act done by him under the authority of the rebel government, there might be some color for the claim. But even then it could not be sustained, because the President has no power to grant pardons for offenses committed against the government and sovereignty of a State. But the idea that it can release one citizen of a State from civil liability to another, is, to say the least of it, novel and extraordinary.

In the case of The People vs. McLeod, 25 Wendell, such a suggestion was thrown out by counsel in argument. The only notice taken of it was the remark made by the Court, that "counsel must have been heated," when they made that remark. It might just as well have been plead in bar to an action on a sealed bill or promissory note.

The 13th section of the Act of Congress passed July 17, 1862, to punish treason, &c., is the act authorising the President to grant pardon to rebels, and the refusal to recognise the pardon as a defence to

the action, is the misconstruction of the Act of Congress which is complained of in the petition in Error.

The certificate of the Court, that the validity of the Act of the Legislature of West Virginia, passed March 1, 1865,* suspending the operation of the statutes of limitations during the rebellion, cannot give jurisdiction to this Court, because the statutes of limitation were suspended by the war, without the aid of the Act of the Legislature of West Virginia. Hanger vs. Abbot, 6 Wallace 536.

It appears from the record that the trespass complained of, was first committed on the 29th of June, A. D. 1862, and continued until the 22d of July, 1862. See record, p. 14. Suit was brought on the 11th of May, 1866. Martial law was established in Monroe County, by the President of the Southern Confederacy, March 29, 1862. Record, p. 19.

The plaintiff in Error was President Davis' Provost Marshal, and caused the arrest of defendant for violation of his proclamation establishing Martial Law.

The President of the United States, on the 1st of July, 1862, in pursuance of an Act of Congress, approved June 7, 1862, declared the State of Virginia, with the exception of certain enumerated counties, not including the county of Monroe, in insurrection and rebellion.

The proclamation of the President of the Confederate States suspended the civil courts under that government, if it was a government which could be recognised by this Court.

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*NOTE.—The following is a copy of the Act:

"AN ACT in relation to the Statutes of Limitation.

Passed March 1, 1865.

"*Be it enacted by the Legislature of West Virginia:*

"In computing the time in which any civil suit, proceeding or appeal shall be "barred by any statute of limitations, the period from the seventeenth day of April, "eighteen hundred and sixty-one, to the date of the passage of this Act, shall be ex- "cluded from such computation."

"AN ACT in relation to the Statutes of Limitation.

Passed February 27, 1866.

"*Be it enacted by the Legislature of West Virginia:*

"In computing the time within which any civil suit or proceeding in trespass or "case shall be debarred by any statute of limitation in the counties of Monroe, [&c., "other counties named,] the period from the first day of March, eighteen hundred "and sixty-five, to the date of the passage of this Act, shall be excluded from such "computation."

The proclamation of the President of the United States suspended the civil courts under the government of the United States, both State and national.

There was therefore no civil courts under any government in which he could have brought his suit. The court of the county was then in rebellion against the United States Government. See Bill of Exceptions, No. 1.

But he could not have been required to bring his action in courts held under authority of the Confederate States.

The defendant in error was arrested for harboring deserters from the rebel army, and giving information to the forces of the United States, the very thing which he was required by his allegiance to the Government of the United States to do. Record, p. 15.

So that he would hardly be required to go into a rebel court for redress for such an injury, if any such court had been open to him.

But if he had brought suit in that court at that time, and obtained a judgment, it would have been absolutely void, as the pretended court was held by persons who had been removed from office by legislation—who were not officers *de jure*, or *de facto*, and whose official acts were void. See Hawner vs. Seldennidge, 2 West Va., 274: Brown vs. Wylie, 2 West Va.. 502: Burkhart vs. Jennings, 2 West Va., 242: Snider vs. Snider, 3 West Va. 200.

The county of Monroe remained in insurrection and rebellion, from the date of the Proclamation of the President of the United States of July 1, 1862, until the insurrection and rebellion was declared to be suppressed in the State of Virginia, by the President's Proclamation of April 2, 1866. The statute of limitation therefore would not run during this period, independent of the West Virginia law of March 1, 1865.

All questions as to the form of the replications, and the effect of demurrers, are questions for the State Court, from the decision of which no appeal lies to this Court.

The replications are merely general replications, denying that the action was barred. It was not necessary to reply specially that the County was in insurrection and rebellion, and that the civil courts were closed.

The Courts must take judicial notice of the state of the country, whether there was peace or war, insurrection or rebellion. 1 Greenleaf on Ev. sec. 6: Taylor vs. Barclay, 2 Simons, 213: Jones vs. Garciodel Rio, 1 Tromer & Russell,297: The Protector, 9 Wallace, 687:

United States vs. Welty, 11 Wallace, 512: Stewart vs. Kahn, 11 Wall, 493.

It is no matter therefore, whether the Act of the Legislature of West Virginia of March 1, 1865, is constitutional or not. The decision was right independent of the statute.

But would it not be extraordinary to hold a mere declaratory act of the Legislature, which in reality merely defined and limited the suspension of the statute of limitation, created by the action of the general government, and existing, independent of the Statute constitutional and void ?

But it is perfectly competent for the Legislature to suspend the operation of the statute of limitation, after the time allowed for the commencement of the suit has elapsed, where no contract or judgment is affected at least. Calder vs. Bull, 3 Dallas, 386: Jackson vs. Lampin, 3 Peters, 290: Wyatt vs. Morris, 2 West Va., 575: Caperton vs. Martin, 4 West Va., 150.

On the 11th of June, 1864, Congress passed an Act, entitled "An Act in relation to the limitation of actions in certain cases," substantially the same as the West Virginia law of March 1, 1865.

That Act applied to all cases, and all places, when no suit could be brought by reason of resistance to the laws or the interruption of judicial proceedings. It did not in terms apply to the time that had elapsed prior to its passage.

The Legislature of West Virginia, acting upon its information and knowledge as to the time that the courts had been suspended, fixed the precise time that the statute should be suspended, and in terms made it applicable to the time that had elapsed, prior to its passage. This Court in the case of Stewart vs. Kahn, 11 Wallace, 493, held not only that Congress had power to pass such a snspending act to operate retrospectively, but also held that it was a remedial statute, was entitled to a liberal construction, and should be held to operate retrospectively, although it did not do so in terms. It also held that the Act was applicable to suits pending in the State Courts.

In the case of the United States vs. Anderson, 9 Wallace, 56, it was held that the rebellion was suppressed by the President's Proclamation of August 20, 1866, so far as the statutes of limitation were concerned. That is, that where a party was allowed two years after the rebellion was suppressed, to bring his action, that the statute did not commence to run until Aug. 20, 1866.

Acts of the Legislature suspending statutes of limitation, are no novelties in Virginia jurisprudence. In 1792 an act was passed by the Legislature of Virginia, suspending the operation of the statutes, for the several periods between the 12th day of April, 1774, and the 12th day of April, 1778; between the 1st day of January, 1781, and the 5th day of January, 1782; and between the 5th day of May, 1783, and the 20th day of October, 1783. Why these particular periods of time were selected, it is a little difficult to determine. Probably it grew out of the military operations of the times.

No Virginia lawyer of that or the succeeding generation, seems to have doubted the validity of this statute.

In the case of Clay vs. Ransom, 1 Munford, 454, it was assumed by the Court as a matter of course, that the periods here specified must be omitted in computing the time which would bar an action of ejectment.

It is well said by the Court in Caperton vs. Martin, 4 West Va., that the action was not barred at the passage of the Act of March 1, 1865, because by reason of the insurrection and rebellion, the statute of limitation had not commenced to run.

The seventh plea which was demurred to, and the demurrer sustained, presents no question of which this Court can take jurisdiction. It is an attempt to justify the arrest under the authority of the rebel government.

This Court has appellate jurisdiction from the State Court. Art. 3, Sec. 2 of the Constitution of the United States, and under the 25th Sec. of the Judiciary Act of 1789, "in all cases in law and equity, "arising under this Constitution, the laws of the United States, and "treaties made or which shall be made under their authority, to all cases "affecting Ambassadors, other public Ministers and Consuls, to all "cases of Admiralty and Maritime jurisdiction, to controversies to "which the United States shall be a party, to controversies between "two or more states, between a state and citizens of another state, be-"tween citizens of different states, between citizens of the same state "claiming land under grants from different states, and between a state "or the citizens thereof, and foreign states, citizens or subjects."

This general grant of power to the Judiciary covers both the original and appellate jurisdiction of this Court.

The 25th Sec. of the Judiciary Act selects from these delegated powers, such as may be exercised by this Court, on appeal from the State Courts.

That section provides that, "when is drawn in question the validi-"ty of a treaty or statute of, or an authority exercised under, the Uni-"ted States, and the decision is against their validity, or when is "drawn in question the validity of a statute of, or an authority exer-"cised under any State on the ground of their being repugnant to "the Constitution, Treaties or Laws of the United States, or when "there is drawn in question the construction of any clause of the Con-"stitution, or of a Treaty or statute of, or Commission held under the "United States, and the decision is against the title, right, privilege "or exemption specially set up or claimed by either party under such "clause of the said constitution, treaty, statute or commission," this Court shall have appellate jurisdiction from the State Court.

We are wholly at a loss to imagine under what clause of this section this Court is supposed to have jurisdiction of the question arising upon the demurrer to this plea.

The plea is simply and briefly, that he acted under the authority of the rebel government, and that therefore he is justified.

But this involves no question upon the validity or construction of the Constitution of the United States, or of any treaty, law, authority or commission derived from the United States, nor upon the validity of any State law on account of its being in conflict with any provision of the Constitution of the United States, or any treaty, law, authority, or commission, derived from the United States.

It is said that it involves a question of international law. If it does, this can give this Court no jurisdiction.

The law of nations is not embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority or commission derived from the United States.

It is true that the Courts of the United States, like the Courts of the States, and of all other civilized countries, recognise the law of nations as binding upon them.

It is in fact a part of the common law of England, brought to this country by our ancestors when they came here, and recognised by the courts of all of the colonies prior to the Revolution. 4 Blackstone's Comm. 67.

The right to decide questions of international law belonged to the Courts of the Colonies at the time of the Revolution, and to the Courts of all the other States at the time of the adoption of the Constitution. When and where did the states surrender this power?

It is claimed that as the Government of the United States is charged

with the management and control of our foreign relations, the Courts of the United States *ought* to have the power of deciding in the last resort, all questions of international law, otherwise difficulties may arise with foreign nations on account of erroneous decisions by the State Courts which the Government of the United States could not provide against.

In reply to this it is sufficient to say, that whether this should have been, or should be the law, yet certain it is that it is not the law.

But whatever force the argument of convenience might have in a case arising between the United States and a foreign nation, it has very little in a case arising out of a defunct rebellion.

It is no great hardship for parties who have plunged the country into a protracted, bloody, and ruinous war, and who have been pardoned for their violation of the criminal laws of the country, to be required to make redress for the injuries which their neighbors have sustained at their hands.

The only case that has arisen in this country so far as we are advised, in which there has been any conflict between the National and State Government, on any question of international law, was the case of Alexander McLeod who was indicted for murder and arson in the State of New York. The offence was committed by a military force under the authority of the British Government, which crossed the Niagara river and seized a vessel lying on the American shore, setting her on fire, and towing her out into the current and turning her loose, to float down over the falls with a man on board.

The British Government avowed the act, as one done under her authority, and demanded the release of McLeod.

As the State of New York had no diplomatic relations with the Government of Great Britain, the demand for the release of McLeod was necessarily made of the Government of the United States. The President of the United States applied to the Governor of New York for the surrender of McLeod to the authorities of the United States. The Governor of New York replied that he was in custody on an indictment for murder, awaiting his trial in the proper court, and that he had no power to take him out of the custody of the law, and therefore he could not surrender him to the authorities of the United States.

The indictment was found in the Court of Sessions for Niagara County.

On application of the defendant, the case was removed by Certiorari, to the Supreme Court of the State.

Application was made to that Court for a writ of Habeas Corpus, upon the return of which, the defendant set up as the ground of his discharge, that the offence with which he was charged was committed by a military expedition under the authority of the Government of Great Britain, that, that Government had ratified and approved the act and assumed all the responsibility for it; that by the well settled principles of international law, he was not personally responsible for an act done by him in obedience to orders emanating from his Government.

The Court held that, inasmuch as there was no war between the United States and Great Britain at the time the offence was committed, an officer of the army had no authority to order an invasion of the territory of the United States; that his order therefore was illegal, and could afford no protection or defence to parties acting in obedience to such an order, and refused to discharge him from custody.

The President instructed the Attorney General of the United States, (Mr. Crittenden), to attend at the hearing on the Habeas Corpus, to furnish the counsel for the defendant such evidence as might be required to show that the offence was committed under the authority of the British Government.

Joshua A. Spencer, the District Attorney of the United States, appeared as one of counsel for defendant, on the argument of the Habeas Corpus.

The decision of the Court was the subject of much criticism at the time. It was denounced by Mr. Webster, who was then Secretary of State, and by Mr. Crittenden, Attorney General of the United States, and many other distinguished Jurists. Whether it was right or wrong, is not material for our present purpose. It may be proper to say however, that the Court which made the decision, was composed of Samuel Nelson, Chief Justice, and Green C. Bronson and Ezek. Cowen, Justices.

It was made thirty years ago, and has never yet been overruled by this Court, or the courts of any State of the United States. It was most emphatically affirmed and approved by the Court of Appeals of West Virginia, in the case of Hedges vs. Price, et al. 2 West Va. Rep. 223.

But certain it is, that no attempt was made to bring the case before this Court for revision. And it is perfectly certain, that if the Administration had supposed that this Court had appellate jurisdiction

from the New York Courts in that case, that the case would have been brought before this Court.

The Administration was seriously embarrassed by the decision. There was great danger of the country being plunged into a war with Great Britain, on account of its failure to surrender McLeod.

Still, the Courts of New York were permitted to maintain their jurisdiction and try McLeod for murder. The country was relieved from further controversy by the jury finding him not guilty.

What is still more conclusive as to the opinion of the jurists of the country, as to the appellate jurisdiction of this Court on questions of international law is, that immediately after the McLeod case was disposed of, an act of Congress passed, to give the Courts of the United States, jurisdiction in similar cases that might thereafter arise. That Act was passed Aug. 29, 1842. It provided that a writ of *Habeas Corpus* might be issued by any Judge of this Court, or any District Judge of the United States, where any "*subject or citizen*" of a foreign state, and "domiciled therein," was imprisoned for any act done or committed under the authority of any foreign state or sovereign, the validity or effect whereof depended on the laws of nations. So far as we are advised, this law has never been before this Court, and no decision has ever been had upon its validity or construction.

We see no reason however for questioning its validity, as the Constitution expressly confers jurisdiction on the Courts of the United States, in all cases where an alien is a party. And "citizens or subjects" of foreign states are aliens.

But Congress has no power to enlarge the jurisdiction of the Courts of the United States, beyond the powers granted by the Constitution to the judicial department of the Government.

But this law can have no application to the case at bar. In the first place, it only applies to parties who are imprisoned, and its only object is to relieve them from imprisonment.

In the next place, it only applies to "citizens or subjects" of a foreign state.

In the third place, it confers no appellate jurisdiction from State Courts, but confers original jurisdiction on any judge of this Court, or any district judge.

The Constitution confers certain specific and enumerated powers on the Judicial Department of the Government, and the judiciary is to be composed of one Supreme Court and such inferior Courts as Congress may from time to time establish.

But the grant of power to the judiciary, does not give jurisdiction to any particular Court that may be organized as part of the judiciary, except in the specified cases in which original jurisdiction is conferred on this Court. This can only be done by an act of Congress organizing the several Courts of which the judiciary is to be composed, and defining their jurisdiction.

Hence, if the Constitution gave the judiciary jurisdiction where a a question of international law was involved, Congress has not given jurisdiction to any Court of the United States, organized for the purpose of exercising the judicial power.

If jurisdiction is conferred on the judiciary over questions of international law, is it appellate or original jurisdiction?

Jurisdiction is conferred on the judiciary over controversies between citizens of different states. But this does not give this Court appellate jurisdiction over cases arising under that clause of the Constitution.

Congress in the distribution of the judicial power amongst the courts, created for its exercise, has prescribed that jurisdiction under this clause, shall be exercised by the Circuit and District Courts, and that it shall be original and not appellate jurisdiction.

Hence, as Congress has not conferred on this Court appellate jurisdiction in any case where any principle of international law is drawn in question, certainly it can exercise no such jurisdiction.

We do not therefore feel called upon to discuss the question, of belligerent rights which was decided by the State Court.

We are aware that the 2d sec. of the act of Feb. 5, 1867, to amend the judiciary act of 1789, omits the closing sentence of the 25th sec. of that act, which provides that no error shall be regarded as ground of reversal, except such as relate to the question of construction and validity, which give the court jurisdiction.

We do not suppose however, that this can change the construction which has heretofore been given to the 25th sec. of the judiciary act of 1789.

The Constitutional provision is, that the judicial power shall extend to all cases *arising under* the Constitution and the laws, &c.

A "case" does not "arise" under the Constitution and laws, &c. of the United States, unless a question arises upon the construction of some clause of the Constitution, or some treaty or law of the United States. And this is applicable, when the "validity of a state law is called in question, because its validity depends upon the construction

of the Constitution or laws of the United States, with which it is supposed to be in conflict.

The jurisdiction of the Court over the "case," results from its jurisdiction over the "question" involved in the case.

Hence its jurisdiction is limited to the decision of the question which gives it jurisdiction. The jurisdiction of the Court cannot be extended to questions arising upon the construction of state constitution and laws, although there may be questions arising upon the Constitution and laws of the United States, involved in the case.

In the case at bar, there is common law questions, and questions on the construction of the Statutes of West Virginia involved. A question is made on a motion to change the venue, on the temporary removal of the seat of justice while the court house was undergoing repairs.

Can these questions of practice in the State courts, and on the construction of State laws, be brought here by way of appeal from the decision of the highest Court of the State, upon the suggestion that there was also a question arising on the Constitution and Laws of the United States involved in, and decided by the State Courts? Surely not.

The Act of February 5, 1867, was before this Court in the case of Stewart vs. Kuhn, 11 Wallace 493, and was not regarded by the Court as enlarging its jurisdiction.

The principle involved here, was decided by the Court in the case of Bethel vs. Demaret, 10 Wallace, 537.

But the decision of the State Court on the demurer to the plea of belligerent rights was clearly right.

It is assumed by those who sustain the defence of belligerent rights, that whenever the established government in a civil war, exercises the powers and rights of a belligerent, and applies to the contest, the rules and usages of war; that it thereby grants to the parties in rebellion, all the rights and immunities of a party to a public international war.

That if it sends or receives a flag of truce, exchanges prisoners, or blockades the ports of the insurgent Government that it thereby makes the insurgents a belligerent power, that has a right to demand all the rights and immunities of an independent nation in a public international war. This is a most pernicious and grave error.

It is one of the essential attributes of sovereignty which belongs to every independent nation, to determine for itself, how it will deal with rebels and insurgents against its authority and Government.

It may treat one of its insurgent citizens as an enemy and hold or exchange him as a prisoner of war, and another as a rebel and traitor and hang him for treason.

We are aware that writers on international law say that the rules and usages of civilized modern warfare, that are applicable to international wars, are equally applicable to civil wars. But they also say, that when an insurrection or rebellion is suppressed, the Government may prosecute the parties that are engaged in it, and punish them for treason and rebellion. It is also true that they say that it is usual to grant an amnesty and pardon to those engaged in the insurrection, but that the leaders are usually exempted from the amnesty.

A belligerent in a public international war is absolutely justified, for whatever he may do under the authority of his Government; his acts are lawful.

A soldier, or officer who acts under the authority of his Government in an international war, commits no crime, incurs no penalties, for which pardon and amnesty can be required. No one doubts but a plea of justification under the authority of a belligerent power in a public international war, would be a good defence to any prosecution, civil or criminal, that might be instituted against a party for any act done under the authority of his Government.

This apparent inconsistency, can only be reconciled, by regarding the rules laid down by writers on international law in regard to civil wars, as addressed to the political sovereignties, that control the military operations of the parties to the war, and not as rules of absolute legal right to be enforced by the judiciary.

This distinction between international and civil wars, was recognised and adopted by the Circuit Court of the United States for the Eastern District of Pennsylvania, in the trial of the officers and crew of the rebel privateer, Jeff Davis, for piracy, in 1861.

The same principle was recognised about the same time by the Circuit Court of the United States for the Southern District of New York, in the case of the United States vs. The officers and crew of the Savannah, for piracy, but it was not so clearly and sharply defined in the New York case as in the Pennsyvania case, though the principle decided in both, is the same. It was held in these cases that the officers and crew of a privateer, cruising under the commission of the President of the Southern Confederacy, could not protect themselves against a prosecution for piracy.

The case of a criminal prosecution for piracy, murder, or treason, is much stronger than a civil action for trespass.

In a criminal prosecution, the felonious intent, is the gist of the offence.

In a civil action, no felonious intent, or intentional wrong, is necessary to make the party liable.

This distinction between civil and international wars, results necessarily from the essential attributes of sovereignty, that must necessarily belong to every government, to use whatever means it may deem necessary, to enforce obedience to its authority.

Every Government must necessarily have the power to suppress and punish insurrection and rebellion.

No other power has a right to interfere between the Government and its rebellious citizen or subject, and say by what means it may compel obedience to its authority, or what punishment it may inflict for resistence to its authority.

Sovereign rights, must from necessity, and from the very nature of government, be paramount and superior to belligerent rights,

International law, only becomes a part of the law of every civilized nation, by the permission and sufferance of the sovereign power of the nation.

If any nation should refuse to be bound by the international code, its judicial organs must reject it as constituting no part of its jurisprudence.

If Congress should pass an act, declaring that the whole, or any part of the code of international law, should not be in force or have any validity in the United States, this Court must carry into execution the expressed will of the political sovereignty from which it holds its commission, and derives its powers.

As to foreign nations, they would have a right to require a compliance with the law of nations, and the nation which should refuse to recognise it, and be governed by it would expose itself to the just condemnation of the civilized world.

But if a nation should choose in the exercise of its paramount and independent sovereignty, to set at defiance the moral sense of the civilized nations of the earth, and refuse to recognise the international code as binding upon her, her Courts, and all subordinate authorities, must recognise and sustain the action of the sovereign from which they derive their powers.

Hence, it is perfectly competent for a nation that is engaged in sup-

pressing an insurrection, which has acquired such proportions as to entitle the contest to be regarded as a civil war, to grant such belligerent rights as it may see proper, to the insurgents; and to withhold such as it may deem it inexpedient to grant. All questions of the kind belong to the political departments of the Government, that have the control of the military operations.

In the case of Rose vs. Himely, 4 Cranch, 272, the doctrines laid down by writers on international law, in regard to the *status* of insurgent forces, claiming belligerent rights; C. J. Marshall says, in reference to a quotation from Vattel—"But the language of that writer is "manifestly addressed to sovereigns not to Courts."

To enable a party to protect himself from personal liability under a military order, it is not enough that it be issued by the commander of a military force.

The military force must represent some sovereignty *de jure* or *de facto* that is authorised to carry on a war.

A belligerent power is not a mere military organization, under military officers. It must be a Government, exercising the ordinary functions of sovereignty, making and publishing laws, collecting taxes, electing or appointing civil officers, holding Courts, &c. &c.

In short, we cannot conceive of a belligerent power, that is not a Government *de jure* or *de facto*.

And it always belongs to the political sovereignty, to determine when an insurrectionary force shall be recognised as a belligerent power, or Government *de facto*.

All the political departments of Government of the United States, have uniformly refused to recognise the Southern Confederary as a belligerent power, or Government *de facto*, except for certain limited and specified purposes.

Our diplomatic correspondence during the war, is full of protests on the part of the Executive, that the United States had never recognised the rebel Government as in any sense a belligerent power, or Government *de facto*.

Congress constantly dealt with the insurgents as rebels, and traitors, by confiscating their property, levying taxes upon them, arresting and trying them for piracy, &c. &c.

The Judiciary, must follow the Executive and Legislative departments of the Government, as to the *status* of parties engaged in the rebellion. This Court has repeatedly refused to recognise the Southern Confederacy as a Government *de facto*.

In the case of the United States vs. Kuhn, 9 Wallace, 83, it was held that a Post Master in North Carolina, who was in office at the breaking out of the war, could not defend himself from an action for money in his hands, by proving that he had paid it to a mail contractor to whom the amount paid was due from the Government of the United States, which was paid on the order of the Confederate Post Master General.

So in the case of Hickman vs. Jones, 9 Wallace, 197, it was held that it was no defence to an action for false imprisonment, that the defendents were Judges, Marshals, and Jurors, under the rebel Government, and that the plaintiff was indicted, arrested, and tried for treason against the Confederate States.

These cases settle the question, that the rebel Government was not a Government *de facto*, whose authority could protect its civil officers for acts done in the discharge of their official duties.

And we are wholly unable to understand why it can afford any more protection to its military, than to its civil officers.

If a Marshal of the Confederate States, armed with a Capias from a Confederate Court, cannot protect himself from an action of trespass and false imprisonment, we are at a loss to imagine, upon what principle a Provost Marshall can protect himself for an arrest and imprisonment without process.

The offence for which the defendant in Error was arrested, was for harboring deserters from the rebel army, and giving information to the armies of the United States, the very thing which he was bound by his allegiance to the Government of the United States to do.

Will the Courts of the United States say, that he might lawfully be imprisoned for such an offence?

There can be no distinction either in law or in reason, between a belligerent power, and a Government *de facto*.

No army or military organization can be recognised as lawful, unless it derives its authority from some recognised sovereignty. And a recognised sovereignty is a Government *de facto* or *de jure*.

And a revolutionary Government *de facto*, which overturns the established Government, and exercises the powers of sovereignty, succeeds to all the rights and powers of the Government which is superseded.

It may dispose of national property, and bind the nation, and the Government that succeeds it, for all debts and liabilities that it may create on behalf of the nation.

Hence, whenever the Government of the United States, recognises

the Government of the Confederate States as a Government *de facto*, it thereby assumes the debts of the Confederate States, and foreign Governments whose citizens hold the bonds of the Confederate States, may demand their payment of the Government of the United States. And there is no principle of international law upon which they can escape liability.

It is true that Congress would probably refuse to assume any such liability.

But this would not be a satifactory reply to the demand of a foreign government, if the Government has or shall make itself liable, on the well settled principle of international law.

B. STANTON,

Att'y for Def't in Error.

SUPREME COURT OF THE UNITED STATES.

December Term, A. D. 1871.

ALLEN T. CAPERTON, Plaintiff in Error,

vs.

WM. A. BALLARD, Adm. of WM. BALLARD, Dec'd, Def't in Error.

In Error to the Court of Appeals of West Virginia.

ARGUMENT FOR DEFENDANT.

This case presents no question for the consideration of this Court, that is not presented and discussed in the case of Caperton vs. Bowyer.

The first and second special pleas in this case, presents the question of belligerent rights, and character of the rebel Government in a different form.

The record shows that letters of Administration on the estate of defendants, intestate, were granted in February, 1863, by the County Court of Monroe County, to John C. Ballard, who gave bond in $2,000.

The county was then under rebel rule and the Court by which the letters of Administration were granted, recognized the rebel State Government at Richmond, and the Government of the so called Confederate States of America.

On the 25th of April, 1866, letters were granted to the defendant by the Circuit Court of Monroe County, West Va., without any express revocation of the letters granted in 1863. The Circuit Court of Monroe County and the Court of Appeals of West Va., held that letters granted in 1863 were illegal and void, because they were not granted by a Court of competent jurisdiction.

It is claimed that this Court can review the decision of the State Courts on this question, on the ground that the County Court of Mon-

roe County was a Court recognised by the Government *de facto*, exercising the powers of a Government over the County.

The question whether this Court has appellate jurisdiction from a State Court, where a question of international law is involved, has been discussed in the case of Caperton vs. Bowyer, and we refer the Court to our argument in that case.

The qnestion is here presented in a form, which is much stronger against the exercise of appellate jurisdiction than it was in that case.

The probate jurisdiction of a State Court, is so purely a matter of State jurisdiction and control, that we can hardly conceive a case in which this Court could take jurisdiction on appeal from a State Court. The regularity and validity of the probate of Wills, the granting of letters of administration, the settlement of estates and kindred questions, are fruitful sources of litigation in the State Courts, and whatever may be the reasons for the judgment of a state court in any case, it seems to us there can be no appeal from its judgment to this Court.

In the case of Mitchell vs. Leroy, 14 Peters, 49, it was held, that this Court has no jurisdiction on account of alleged inconsistencies between two decrees of the State Court.

In the case of Tanner vs. Tanner, 9 Peters, 173, it was held that the order of a probate Court admitting a will to probate, could not be impeached by a bill in Chancery, but must be reversed on appeal from the order of the Probate Court.

If it was Error for the Circuit Court of Monroe County to grant letters of Administration to the defendant in Error, while the grant of letters to John C. Ballard, by the rebel County Court of the County was standing and not revoked or reversed, the order of the Circuit Court could only be reversed by appeal to the Court of Appeals of the State. That the Circuit Court of Monroe County was a Court of competent probate jurisdiction cannot be controverted.

When application was made to that Court for letters of Administration on the estate of defendants intestate, it was the duty of that Court to decide whether the estate had already been committed to another person, by any Court of competent jurisdiction.

And that Court having decided that question, its judgment cannot be impeached collaterally in an action of trespass, but remains in full force until it is reversed by the proper appellate Court.

It may be as well to say here that all grants of letters of Administration and all exercise of probate jurisdiction by Courts recognizing the rebel governments, State and National, have been uniformly held

void by the Court of Appeals of West Va., and it is believed that where letters have been granted by such Courts, they have been treated as void, and letters have been granted by the probate Courts of the State. If it should now be held that such grants of Administration by rebel Courts were valid, and that letters subsequently granted by the Courts of this State were void, it would be productive of endless confusion. Snider vs. Snider, 3 West Va. Rep. 200; Hawver vs. Seldenridge, 2 West Va. 274; Burkhart et. al. vs. Jennings, 2 West Va. 242; Brown et. al. vs. Wylie, 2 West Va. 501.

We cannot see how this case can be distinguished from the case of Jones vs. Hickman, 9 Wallace, 197, where it was held that the judgment of a rebel Court was illegal and void, and could not protect the Judges and Marshal from an action for false imprisonment.

But whether the judgment of the State Courts was right or wrong, what has this Court to do with the question in this case? As to all other questions arising on the record in this cause, we refer the Court to our argument in the case of Caperton vs. Bowyer.

B. STANTON,

Att'y for Def't in Error.